

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| <u>DOCUMENT 1</u> Civil Docket, United States District Court in Civil Action No. C-69 470; | 1 |
| <u>DOCUMENT 2</u> Petition for Writ of Habeas Corpus and for Temporary Restraining Order, filed by Petitioner on November 28, 1969 in the United States District Court for the Northern District of California, in Civil Action No. C-69 470; | 5 |
| <u>DOCUMENT 3</u> Affidavit of Joseph Parisi, in Support of Petition for Habeas Corpus filed by Petitioner on November 28, 1969 in the United States District Court for the Northern District of California, in Civil Action No. C-69 470; | 16 |
| <u>DOCUMENT 4</u> Order re Preliminary Injunction filed on November 28, 1969 in the United States District Court for the Northern District of California in Action No. C-69 470; | 29 |
| <u>DOCUMENT 5</u> Order filed December 10, 1969 in the United States Court of Appeals for the Ninth Circuit in Action No. 25133; | 32 |
| <u>DOCUMENT 6</u> Opinion of Mr. Justice William O. Douglas, dated December 29, 1969; | 34 |

TABLE OF CONTENTS (Cont'd)

| | <u>Page</u> |
|---|-------------|
| <u>DOCUMENT 7</u> Affidavit of Richard L. Goff, filed by Petitioner on March 6, 1970 in the United States District Court for the Northern District of California, in Civil Action No. C-69 470; | 38 |
| <u>DOCUMENT 8</u> Order to Show Cause filed on March 6, 1970 in the United States District Court for the Northern District of California, in Civil Action No. C-69 470; | 42 |
| <u>DOCUMENT 9</u> Motion for Stay filed by Respondents on March 20, 1970 in the United States District Court for the Northern District of California; in Civil Action No. C-69 470; | 45 |
| <u>DOCUMENT 10</u> Order Staying Proceedings and Certifying for Interlocutory Appeal filed on March 31, 1970 in the United States District Court for the Northern District of California, in Civil Action No. C-69 470; | 52 |
| <u>DOCUMENT 11</u> Order filed April 24, 1970 in the United States Court of Appeals for the Ninth Circuit in Action No. 25773; | 56 |
| <u>DOCUMENT 12</u> General Court-Martial Order Number 105 dated July 2, 1970; | 58 |
| <u>DOCUMENT 13</u> Opinion filed on December 3, 1970 in the United States Court of Appeals for the Ninth Circuit in Action No. 25773; | 61 |

TABLE OF CONTENTS (Cont'd)

Page

DOCUMENT 14 Judgment of the United
States Court of Appeals for the
Ninth Circuit, dated December 3,
1970 in Action No. 25773

95

DOCUMENT 15 Order of the United
States Supreme Court, dated
May 3, 1971 granting the petition
for a Writ of Certiorari in Action
No. 1413.

97

CIVIL DOCKET
UNITED STATES DISTRICT COURT

C-69 470 RHS

JOSEPH PARISI

vs.

MAJOR GENERAL PHILLIP B.
DAVIDSON, et al.

Basis of Action: Petition for Writ of
Habeas Corpus & Temporary Restraining
Order.

PROCEEDINGS

1969:

Nov. 28 -

1. Filed Petition for Writ of Habeas Corpus.
2. Filed Affidavit of Joseph Parisi.
3. Filed Affidavit of Richard L. Goff.
4. Filed Memorandum of Points & Authorities.
5. Filed Supplemental Memorandum of Points & Authorities.
6. Filed ORD re prelim. inj.

2
Dec. 10 -

7. Filed notice of appeal by plaintiff.

Dec. 12 -

Mailed Clerk's notice of filing appeal.

8. Filed cert copy of ord from USCA, 9th Cir, denying no staying orders deployment, on condition that resps produce appellant in this district if appeal results in his favor.

Dec. 19 -

9. Filed letter from attorney Douglas M. Schwab stating that Reporter's Transcript will not be necessary for the appeal.

1970:

Jan. 7 -

10. Filed certified copy of Order of CCA re: Expedited Appeal.

Jan. 12 -

Made, Mailed Record on Appeal CCA

Jan. 14 -

11. Filed receipt of record on appeal, CCA #25133.

Mar. 6 -

12. Filed OSC, ret. 3-24-70.

13. Filed affidavit of Richard L. Goff.

Mar. 9 -

14. Filed petnr's affidavit of svc by mail of OSC.

Mar. 19 -

ORD. hrg. on OSC contd to 3-26-70.
in Oakland. (Burke)

Mar. 20 -

15. Filed resps mo for stay of proceedings pending petnr's exhaustion of his available military judicial remedies.

Mar. 25 -

16. Filed petnr's Reply Brief.

17. Filed affidavit of petnr.

Mar. 27 -

18. Filed letter from USCA, 9th Cir., returning file to USDC.

Mar. 31 -

19. Filed Order staying proceedings and Certifying for Interlocutory Appeal. (Burke)

Apr. 3 -

Copy of Order mailed to Attorneys of record.

Apr. 20 -

20. Filed certified true copy of Judgment of 9th circuit ct. that the appeal is dismissed, as moot.
(Hamley)

Apr. 27 -

21. Filed receipt of Wm B. Luck, Clerk, Apr. 24, 1970 on ord. #25773. The court DENIES petitioner-appellant's [sic] mo to treat his application & his reply brief in the district court as his opening brief in this court.
(Ely)

Dec. 22 -

Case ORD reassigned to Judge Schnacke.

1971:

Jan. 15 -

22. Filed copy CCA ord. affirming USDC decision.

RICHARD L. GOFF
 DOUGLAS M. SCHWAB
 44 Montgomery Street, Suite 3000
 San Francisco, California 94104
 Telephone: 981-5000
 Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B.
 Davidson, Etc., et al.,

Respondents.

PETITION FOR WRIT OF HABEAS
 CORPUS AND FOR TEMPORARY
 RESTRAINING ORDER

Comes now Petitioner, Joseph Parisi,
 and petitions this Court for a Writ of Habeas
 Corpus and Temporary Restraining Order:

FIRST CAUSE OF ACTION

I

Petitioner is a member of the Armed Forces of the United States, having been inducted into the United States Army.

II

Petitioner is presently in the custody of respondents at the United States Army Training Center, Fort Ord, California, and by such custody is thereby restrained and deprived of his liberty. For the past several months, Petitioner's assigned duties at Fort Ord have been to work in the hospital.

III

The custodians immediately charged with the control and custody of Petitioner are presently Major General Phillip Davidson, Commanding General, United States Army Training Center, Fort Ord, California, and Captain Coughlin, Commanding Officer, Hospital Company, United States Army Training Center, Fort Ord, California. They act on behalf of the United States Army.

IV

Pursuant to Department of Defense Directive (D. O. D.) 1300.6 (effective May 10, 1968), Petitioner has filed, with the appropriate Army officials, an Application for Discharge from the Army on the ground that, since entering the Army, he has become, by reason of his religious training and belief, opposed to participation in war in any form, and, therefore, entitled to discharge from the United States Army by reason of such beliefs.

V

Said Application, a copy of which has been attached hereto as Exhibits A & B and which is incorporated herein by reference, has been processed in accordance with Army and Department of Defense regulations.

Pursuant to Army Regulation 635-20 (AR 635-20), Petitioner was interviewed by a psychiatrist, a chaplain and by an officer with the rank of Captain (O-3). Copies of

the reports of said interviews are attached hereto and marked as Exhibits C, D, and E. Said reports, without exception, recognize Petitioner's sincerity concerning his conscientious objection. The chaplain's report concludes that religious training and religious commitment provide the foundation for his present conscientious objection. Also attached to this Petition, as Exhibit F, is a copy of a report by Petitioner's Commanding Officer, recommending disapproval of Petitioner's Application. Said report was not based on an interview with Petitioner.

Following the above-mentioned interviews, Petitioner's Application was forwarded to Army officials in Washington, D.C. Said officials, without any basis in fact, rejected said Application. Attached hereto and marked as Exhibit H

is a written communication from the Adjutant General's Office to Petitioner purporting to summarize an oral conversation with Army Officials in Washington, D.C. in which said officials gave their reasons for rejecting Petitioner's Application.

VI

Following denial for his Application for Discharge by Army officials in Washington, D.C., Petitioner received orders to report on December 1, 1969, for weapons training preparatory to being transferred for duty to Viet Nam. Also following said denial, Petitioner received instructions that he is to comply with his original assignment orders, calling for duty in Viet Nam. Respondents threaten to, and unless restrained by this Court will, transfer Petitioner to and force him to perform such duties. Such duties will seriously

conflict with Petitioner's conscientiously held religious beliefs. Furthermore, in the event Petitioner is forced to carry out the above orders, and report for duty as above alleged, Petitioner may be without the jurisdiction of this court and may be thereby deprived of his immediate right to discharge should his Petition be granted by this court.

VII

There is no basis in fact for denial of Petitioner's Application for discharge on the ground that his convictions were held prior to entry into the Armed Forces. There is absolutely no evidence of this in the file; indeed, the only evidence in the file on this point is to the contrary. Furthermore, when both the hearing officer and the chaplain affirmed Petitioner's sincerity and where both affirmed the fact that because of religious training and belief, Petitioner is opposed to war in

any form, to deny Petitioner discharge on the ground that he held these beliefs prior to entry into the Military Service (while at the same time granting discharge to one who came to hold the identical beliefs after entry into the Military Service) would be arbitrary and unreasonable and would deny Petitioner his right to equal protection under the law.

Nor is there any basis in fact for denial of this Application for any of the other reasons set forth in the written communication attached hereto and marked as Exhibit H. This is particularly true where it is unquestioned by everyone who has interviewed Petitioner that he is sincere and that his convictions are based on religious training and belief.

Since there is no basis in fact for the denial of this Application for Discharge, it is likely that Petitioner will prevail in this Court in his Application

for a Writ of Habeas Corpus.

VIII

No irreparable harm will result to Respondents if this Court restrains and enjoins them from requiring Petitioner to comply with orders for weapons training and for transfer out of this Court's jurisdiction.

SECOND CAUSE OF ACTION

I

Petitioner incorporates herein by reference all the allegations set forth in Paragraphs I through VIII, inclusive.

II

Following denial of his Application for Discharge by Army officials in Washington, D.C., Petitioner applied to the Army Board of Correction of Military Records (A. B. C. M. R.) for review of said denial. The A. B. C. M. R. has not yet acted on Petitioner's request.

III

Under Department of Defense Directive 1300.6 at Section VI (B) (2), pending decision upon an Application for Discharge on the basis of conscientious objection, "The person will be employed in duties which involve the minimum conflict with his asserted beliefs." AR 635-20 provides even stronger support for this proposition. It states: "6. Assignment. a. Except as indicated in b below, an individual who applies for discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum practicable conflict with his asserted beliefs pending a final decision on his application."

IV

Notwithstanding such regulations, Petitioner has received from Respondents the orders referred to in Paragraph VI of the First Cause of Action. Said

orders, and the duties which they require, seriously conflict with Petitioner's conscientiously held religious beliefs and to more than the minimum extent permitted under the above cited regulation.

V

In the event the Petitioner is forced to carry out the orders referred to in Paragraph VI of the First Cause of Action, and report for duty as above alleged, Petitioner will be without the jurisdiction of this Court and will be deprived of effective access to judicial relief if his pending Application is denied by the A. B. C. M. R.

WHEREFORE, Petitioner prays as follows:

1. That the Court grant his Petition for Writ of Habeas Corpus and order Respondents to release him from their custody and discharge him from

the Army;

2. That the Court enjoin Respondents from requiring Petitioner to perform the orders referred to above and further enjoin Respondents from transferring Petitioner outside this Court's jurisdiction, and that the Court enter a temporary order restraining Respondents from requiring Petitioner to perform the orders referred to above and further restraining Respondents from transferring Petitioner outside this Court's jurisdiction, and that the Court order Respondents to show cause why a Writ of Habeas Corpus should not be granted, and why a preliminary injunction should not be issued;

3. For such other and further relief as the Court shall deem just and proper.

Dated: November 24, 1979.

/s/ Richard L. Goff
/s/ Douglas M. Schwab
Attorneys for Petitioner

RICHARD L. GOFF
DOUGLAS M. SCHWAB
44 Montgomery Street, Suite 3000
San Francisco, California 94104
Telephone: 981-5000
Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B.
Davidson, Commanding General,
United States Army Training
Center, Fort Ord, California;
Captain Coughlin, Commanding
Officer, Hospital Company,
United States Army Training
Center, Ford Ord, California;
and Stanley Resor, Secretary
of the Army,

Respondents.

AFFIDAVIT OF JOSEPH PARISI, IN
SUPPORT OF PETITION FOR HABEAS CORPUS.

STATE OF CALIFORNIA)

)

ss.

COUNTY OF MONTEREY)

JOSEPH PARISI, being duly sworn,
deposes and says:

1. I am the petitioner herein. All facts hereinafter stated are true within my own personal knowledge.

2. I have read Exhibits "A", "B", "C", "D", "E", "F", "G", "H" and "I" to the petition for Habeas Corpus filed in the above entitled action. Said Exhibits "A" and "B" constitute a true and complete copy of my application for discharge from the United States Army as a conscientious objector pursuant to Department of Defense Directive 1300.6 and Army Regulation 635-20. Exhibit "A" fully and thoroughly sets forth the nature of my religious beliefs and my opposition to participation in war in

any form which is based upon such beliefs.. Exhibit "B" is a group of letters, attesting to my beliefs, from people who have known me.

Exhibits "C" and "D", respectively are true and correct copies of the favorable endorsements to my application by the psychiatrist and Chaplain at Fort Ord, as a result of my required interviews with them.

3. Exhibit "E" is a true and correct copy of the findings and decision - recommending approval - of Captain Ronald A. Zanoni, the hearing officer, as a result of my hearing before him concerning my application pursuant to the regulations. Attached to Exhibit "E" is a copy of a letter of August 25, 1969 from me to my congressman concerning my application.

4. Exhibit "F" is a copy of the recommendation concerning my application by Captain George E. Hubman, my immediate commanding officer in the Hospital Company. Captain Hubman did not at any time interview me concerning my application or my conscientious objector beliefs. I never had any conversations with Captain Hubman about my religious convictions and my beliefs in respect to war and military service. The only conversations which I ever had with Captain Hubman concerning my application for discharge as a conscientious objector were on two occasions when I asked Captain Hubman why the application was not being processed and why orders had been issued and were outstanding for me to be transferred to Viet Nam while my application was pending, and he replied that the matter

would be taken care of.

5. Before my application and other related papers were forwarded to the Department of the Army in Washington D.C. the Adjutant General at Fort Ord, acting for the Commanding General at Fort Ord, placed a notation in the file recommending that my application be approved.

6. Exhibit "G" is a copy of a telegram from the Department of the Army in Washington to the Fort Ord Army Base, dated November 1, 1969 stating that my application had been disapproved; and Exhibit "H" is a communication from the Adjutant General at Fort Ord to the Hospital Company to which I am assigned, purporting to summarize a verbal communication with the Department of Army in Washington as to the

reasons for disapproval of my application. I did not receive either of the foregoing documents or learn of the disapproval until Monday, November 17, 1969. I have not yet received from the Department of the Army a written explanation of why my application was denied.

7. On November 24, 1969, I submitted to the Army Board for Correction of Military Records an application for its review and correction of the Army's denial of my application for discharge as a conscientious objector. I have notified my immediate commanding officer, at Fort Ord, of my filing of this petition. A copy of this petition is attached as Exhibit "I" to the petition for habeas corpus herein.

8. At my hearing on October 6, 1969 before the Hearing Officer, Captain Zaroni, I was questioned extensively by Captain Zaroni about the source and development of my beliefs as a conscientious objector and when those beliefs arose and became fixed. I was specifically asked whether I did not have these convictions before I entered in the service and, if not, what my beliefs were at the time I entered in the service. I replied that at the time I entered the service I did have certain feelings or leanings toward non-violence; that these were uncertain and unclear in my mind; and that I was not then opposed to all military service or activity and believed that in the military I would be able to be in a position where I could help and assist others. I further stated that it was

only after the experience of combat training in basic training, coupled with intensive Bible reading and discussion of my religious beliefs, that I realized that I was totally opposed on religious grounds to any form of war or military service. The hearing officer also questioned me about whether I was opposed to all military service or only the direct participation of direct combat activity. I stated that since joining the army I had come to realize that any form of military service (including the psychological social work in which I was engaged at Fort Ord) was a form of support of the military and the organized violence inherent in the military; and that I was conscientiously opposed to giving such support.

9. The report of the Chaplain (Exhibit "D") refers to my "acknowledgement of conceivable situations where force with a 'benevolent intent' is necessary, and therefore, justified". This refers to my statements, both in my application and in my interview with the Chaplain, that I believed I might use force in individual situations to restrain an individual from harming himself or harming someone else, but that such force would be the minimum restraint necessary. However, I have at all times stated, both in my application and in my interview with the Chaplain and other interviews, that I did not and could not believe in the use of organized military force for any purpose.

10. I was drafted on August 22, 1968. After going through basic training,

I was and still am assigned to the Mental Hygiene Consultation Division of the Hospital Company at Fort Ord to serve as a psychological social worker, interviewing and giving assistance to military personnel with psychiatric or psychological problems. However, in June 1968, shortly after my application for discharge as a conscientious objector had been submitted, I was advised by one of my superiors in the Hospital Company that I had been placed on a "levy", i.e., a list of persons, for assignment to Viet Nam. Although I protested that such an assignment pending my application for discharge as a conscientious objector was contrary to the Army regulations, on August 8, 1969 special orders were issued (see Exhibit "A" to this affidavit) which would have required

me to undertake training for and then to be transferred to service in Viet Nam. Subsequently, on August 22, 1969, however, these orders were revoked (see Exhibit "B" hereto).

11. However, on Tuesday, November 18, 1969 I received a telephone call from the Personnel Action Division of the Hospital Company, advising me that new orders have been issued assigning me for service in Viet Nam. I was told to report to the Personnel Office. I reported to the Personnel Office on November 20, 1969 and was told by Specialist Thomi that the orders transferring me to Viet Nam are being typed up, and that commencing Monday, December 1, 1969, I am to undergo "RVN" training in preparation for such service in Viet Nam.

12. The "RVN" training would require me to participate in target

practice with rifles and machine guns, and field training in simulated combat situations. The Viet Nam service would involve psychological social work in the field, could require at any time my direct participation in combat and carrying of weapons, and at all times would involve direct participation in supporting of combat activities in Viet Nam and helping to prepare soldiers for battle.

13. The training activities and Viet Nam service described above would be in direct and serious conflict with my religious convictions of conscientious objector. If I am forced to perform them I would be forced to directly violate my own religious beliefs.

14. I am willing to continue performance of my psychological social work at the Mental Hygiene Consultation

Division at Fort Ord, pending resolution of my request for discharge as conscientious objector. I consider this job in minimum conflict with my beliefs as a conscientious objector.

I feel that the orders for RVN training and for service in Viet Nam require duties which are in far greater conflict with my religious beliefs and which, because of such beliefs, I could not perform.

DATED: November 25, 1969

/s/ Joseph Parisi

Subscribed and sworn to before
me this 25th day of November, 1969.

/s/ Herbert A. Schwartz
Notary Public in and for
the County of Monterey
State of California
My Commission
Expires: January 29, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

| | |
|--------------------------|---|
| Joseph Parisi, |) |
| |) |
| Petitioner, |) |
| |) |
| vs. |) |
| |) |
| Major General Phillip B. |) |
| Davidson, Etc., et al., |) |
| |) |
| Respondents. |) |

ORDER RE PRELIMINARY
INJUNCTION


The court has considered petitioner's verified petition for habeas corpus and supporting affidavits and points and authorities and the oral arguments of counsel -- Richard L. Goff and Douglas Schwab appearing for petitioner, and Steven Kazan for Respondents, and the court has held a hearing on petitioner's application for preliminary injunction; and good

cause appearing therefor, the Court makes the following order:

Pending the decision on Petitioner's Application for Discharge from the Army as a conscientious objector, by the Army Board for Correction of Military Records, and the further order of this Court, each of the above named respondents is hereby restrained from assigning the petitioner, Joseph Parisi, to any duties which require materially greater participation in combat activities or combat training than is required in his present duties.

It is further ordered that this court shall retain jurisdiction of this case until decision on petitioner's application by the Army Board for Correction of Military Records.

Petitioner's application for preliminary injunction against transferring petitioner out of the Northern



District of California is denied.

Dated: November 28, 1969

/s/ Lloyd H. Burke
United States District
Judge

The requisite service of process may
be made by a private citizen as well as
by a United States Marshal.

Dated: November 28, 1969

/s/ Lloyd H. Burke
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Civil No. 25133

Joseph Parisi,

Petitioner and Appellant,

vs.

Major General Phillip B. Davidson,
etc., et al.

Respondents and Appellees.

ORDER

Before CARTER and WRIGHT, Circuit Judges.

Appellant moves for an order staying his deployment by the military outside of the jurisdiction of the United States District Court for the Northern District of California pending a ruling on his appeal.

ORDERED, that the motion is denied on condition that Respondents

produce the Appellant in this district
if the appeal results in his favor.

/s/ James M. Carter

/s/ Eugene A. Wright

United States Circuit Judges

SUPREME COURT OF THE UNITED STATES

October Term, 1969

Joseph Parisi,

Petitioner,

v.

Major General Phillip B. Davidson,
etc., et al.APPLICATION FOR A STAY

[December 29, 1969]

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicant claims he is a conscientious objector entitled to classification as such. The Army did not approve that classification and his appeal is now pending before the Army Board for Correction of Military Records.

Meanwhile he applied to the District Court for the Northern District of California for a writ of habeas corpus, and for an order restraining respondents

from transferring him out of the Northern District of California.

The District Court denied that relief but it did restrain respondents from assigning applicant "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties." The District Court retained jurisdiction of the case.

Applicant appealed to the Court of Appeals and asked for an order staying his deployment pending disposition of his appeal. That court denied his motion for a stay "on condition that respondents produce the appellant in this district if the appeal results in his favor." He now seeks a stay from me, as Circuit Justice; and he represents that he is under orders to report for deployment to Vietnam day after

tomorrow, December 31, 1969.

Applicant is at present assigned to duties of "psychological counseling". It would seem offhand that "psychological counseling" in Vietnam would be no different than "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.

I heretofore granted like stays in cases involving deployment of alleged conscientious objectors to Vietnam. See Quinn v. Laird, 89 S. Ct. 1491. But this case is different because of the protective orders issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. Moreover, as the Solicitor General points out, the Secretary of the Army is a party to this action; hence the

case will not become moot by the deployment.

If it were clear that applicant would win on the merits, a further protective order at this time would be appropriate. But the merits are in the hands of a competent tribunal as yet unresolved. And I cannot assume that the Army will risk contempt by flouting the protective order of the District Court.

Application denied.

RICHARD L. GOFF
 DOUGLAS M. SCHWAB
 44 Montgomery Street, Suite 3000
 San Francisco, California 94104
 Telephone: 981-5000

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69 470 LHB

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B.
 DAVIDSON, etc., et al.

Respondents.

AFFIDAVIT OF RICHARD L. GOFF

On March 5, 1970, I received a copy of a letter addressed to Petitioner, a copy of which is attached hereto as Exhibit A, informing Petitioner that the Army Board for Correction of Military Records denied his application

for relief.

/s/ Richard L. Goff

Subscribed and sworn to
before me this 5th day of
March, 1970.

/s/ Josephine Hulsman
Notary Public for the City
and County of San Francisco,
State of California

My Commission Expires:

40

Department of the Army
Office of the Adjutant General
Washington, D. C.
20310

2 Mar 1970

AGPE-RP Parisi, Joseph
048 34 0713, US52726468 (24 Nov 69)

PFC Joseph Parisi, 048 34 0713
Hospital Company
U. S. Army Hospital
Fort Ord, California 93941

Dear Private Parisi:

I have been requested by the Army Board for Correction of Military Records to make further reply to your request for correction of your Army records.

The administrative procedures established by the Secretary of the Army for the guidance of the Army Board for Correction of Military Records provide that the Board may deny an application where a sufficient basis for a review has not been established.

Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has

Exhibit A - Page 1

been presented to indicate probable material error or injustice. Accordingly, your application was denied.

In the absence of new and material evidence tending to show the existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Sincerely,

/s/ Kenneth G. Wickham
Major General, USA
The Adjutant General

CF
Mr. Dick Goff
44 Montgomery St.
San Francisco, CA 94104

Exhibit A - Page 2

RICHARD L. GOFF
 DOUGLAS M. SCHWAB
 44 Montgomery Street, Suite 3000
 San Francisco, California 94104
 Telephone: 981-5000

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69 470 LHB

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B.
 DAVIDSON, etc., et al.

Respondents.

ORDER TO SHOW CAUSE

TO RESPONDENT STANLEY RESOR, Secretary
 of the Army:

GOOD CAUSE APPEARING THEREFOR, IT
 IS HEREBY ORDERED that you shall appear
 before this Court in the Courtroom of
 the Honorable Lloyd H. Burke, at the

Federal Building, 450 Golden Gate Avenue, San Francisco, California, on March 26, 1970, then and there to show cause, if any you have, why a Writ of Habeas Corpus should not be issued as prayed for in the Petition for Writ of Habeas Corpus filed herein, and

IT IS FURTHER ORDERED that you shall have to and including the 16th day of March, 1970, to have on file all affidavits and points and authorities on which you rely, and petitioner shall have to and including the 24th day of March, 1970, to file herein counter-affidavits and points and authorities in reply.

Dated: Mar. 6 1970

/s/ Lloyd H. Burke

United States District Judge

The requisite service of process

may be made by a private citizen
as well as by a United States
Marshal.

Dated: Mar. 6 1970

/s/ Lloyd H. Burke

United States District Judge

JAMES L. BROWNING, JR.
 United States Attorney
 STEVEN KAZAN
 Assistant United States Attorney
 450 Golden Gate Avenue
 San Francisco, California 94102
 Telephone: 556-6434
 Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-69-470-LHB

JOSEPH PARISI,

Petitioner

v.

MAJOR GENERAL PHILLIP B.
 DAVIDSON, etc., et al.

Respondents.

MOTION FOR STAY

Pursuant to this Court's Order
 of March 6, 1970, requiring
 respondents to appear and show cause why
 a writ of habeas corpus should not be
 issued, respondents herewith move the

Court to stay these proceedings pending petitioner's exhaustion of his available military judicial remedies.

On November 28, 1969 this Court denied petitioner's request for a preliminary injunction keeping him in the district. Then, on December 4, 1969 petitioner filed his Notice of Appeal in the Ninth Circuit, and moved ex parte before that court for a stay pending appeal. On December 10, 1969 that Court denied a stay on condition that respondents produce petitioner in this district if the appeal results in his favor.

On December 18, 1969 ¹² petitioner sought a stay from the Honorable William O. Douglas, Circuit Justice for the Ninth Circuit Court of Appeals. On

December 29, 1969, Mr. Justice Douglas denied the application for stay.

The petitioner was given orders in early December 1969 to report on December 31, 1969 for shipment to Vietnam.

Petitioner reported as directed on December 31, 1969, to the U. S. Army Personnel Center, Fort Lewis, Washington. At that point, he requested an opportunity to file a second application for discharge as a conscientious objector. As required by AR 635-20, he was given seven days to complete his application. But, on or about January 6, 1970, he advised the authorities at the Personnel Center that he no longer wished to make application. Accordingly, he was booked for shipment.

Petitioner then refused to

obey a lawful order to board the plane which was to take him to Vietnam. Accordingly, he has been charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C., Section 890, and has been confined in the Post Stockade, Fort Lewis, pending disposition of the charges against him. The offense with which he is charged is serious enough to warrant trial by General Court-Martial, and Article 32 Investigation, a necessary prerequisite to trial, has been completed. We understand that the trial is set for April 8, 1970.

For this Court now to consider the merits of petitioner's application for writ of habeas corpus would, under the state of facts which now exist, result in an unwarranted interference by the Court with the pending court-martial. Since petitioner has now subjected himself

to trial by court-martial, he should be required to exhaust his military judicial remedies. In re Kelly, 401 F.2d 211 (5th Cir. 1968); followed Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); compare Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967); aff'd 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1022 (1967); United States v. Augenblick, 393 U.S. 348 (1969); Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683, 693-699 (1969). Under recent military cases, the denial of petitioner's application may indeed be a defense to the charges against him; see United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). As the Ninth Circuit has observed in a similar context, ". . . it would seem intolerable to permit [petitioner] to run civil proceedings . . .

parallel to his criminal charge when he is on the eve of trial." McFadden v. Selective Service System, 415 F.2d 1140, 1141 (9th Cir. 1969).

Accordingly, the proceedings in this Court should be stayed pending the exhaustion of petitioner's military judicial remedies.

Dated: March 20, 1970.

JAMES L. BROWNING, JR.
United States Attorney

By /s/ Steven Kazan

Assistant United States
Attorney

Attorneys for Respondents

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that a conformed copy of the foregoing Motion for Stay was mailed today to

DOUGLAS M. SCHWAB, ESQ.
44 Montgomery Street, Suite
3000
San Francisco, California 94104

as attorney for petitioner in this cause.

Dated: March 20, 1970.

By: /s/ Steven Kazan
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-69 470 LHB

Joseph Parisi,

Petitioner,

vs.

Major General Phillip B.
Davidson, Etc., et al.,

Respondents.

ORDER STAYING PROCEEDINGS
AND CERTIFYING FOR INTER-
LOCUTORY APPEAL

This matter came on regularly for hearing on March 26, 1970 pursuant to this court's order to show cause dated March 6, 1970, and pursuant to Respondents' motion for stay of proceedings pending exhaustion of military judicial remedies. Richard L. Goff and Douglas M. Schwab appeared as counsel for

petitioner; Steven Kazan, Assistant United States Attorney, appeared as counsel for respondents. After considering the documents and records on file in this action, and the oral arguments of counsel, and good cause appearing therefor,

1. IT IS HEREBY ORDERED that these proceedings are hereby stayed until there has been trial and a final judgment in the military courts on the court martial charges presently pending against petitioner. In re Kelly, 401 F.2d 211 (5th Cir. 1968); followed Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); compare Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967); aff'd 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1022 (1957); see United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). Cf. McFadden v. Selective Service System, 415 F.2d 1140, 1141 (9th Cir. 1969).

2. It is the opinion of this court that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion,^{*/} to wit:

If a member of the Armed Services has filed in the Federal District Court a petition for a Writ of Habeas Corpus discharging him from the armed services on the ground of wrongful denial of his application for discharge as a conscientious objector, and if, while such proceedings are pending, he is charged by military authorities with refusing to obey a military order given to him after the filing of such Habeas Corpus petition, is it proper for the District Court to stay all further proceedings on the petition for the Writ of Habeas Corpus until the termination of court martial proceedings on the military charges against the petitioner?

^{*/} See Gann v. Wilson, 289 F. Supp. 191, 193 (N.D. Cal. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968); Telford v. Seaman, 306 F. Supp. 941 (D.Md. 1969); Hammond v. Lenfest, 398 F.2d 705, 712-14 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D.Md. 1969)..

and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: March 31, 1970

/s/ Lloyd H. Burke
United States District
Judge

Order approved as to form

/s/ Richard L. Goff
Attorney for Petitioner

Paragraph 2 of order approved
as to form

Attorney for Respondents

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

25773
No. M-5016

JOSEPH PARISI,
Petitioner-Appellant,
v.
MAJOR GENERAL PHILLIP B.
DAVIDSON, etc., et al.
Respondent-Appellees.

ORDER

Before: DUNIWAY and ELY, Circuit Judges.

The petitioner's "Application for
Leave to Take Interlocutory Appeal"
is granted.

The documents attached to
petitioner's application, in the
absence of objection filed by the
respondent-appellees on or before
May 4, 1970, will be treated as the
record on appeal.

The court denies petitioner-appellant's motion to treat his application and his reply brief in the District Court as his opening brief in this court. The petitioner-appellant will file his opening brief on or before May 11, 1970. The respondent-appellees will file their brief within fifteen days thereafter, and the petitioner-appellant may have five days from his attorney's receipt of respondent-appellees' brief within which to file a reply.

The Clerk is directed to set the cause for hearing, if possible, on the court's June 1970 calendar, preferably in San Francisco.

/s/ Walter Ely

United States Circuit Judge

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY TRAINING CENTER,
INFANTRY AND FORT LEWIS, FORT LEWIS,
WASHINGTON 98433

2 July 1970

GENERAL COURT-MARTIAL ORDER
NUMBER 105

Before a general court-martial which assembled at Fort Lewis, Washington, pursuant to Corrected Court-Martial Convening Order Number 19, this headquarters, 6 January 1970, was arraigned and tried:

Private First Class Joseph Parisi,
SSAN: 048 34 0713, U.S. Army, U.S.
Army Overseas Replacement Station
(attached Transient Company) U.S.
Army Personnel Center, Fort Lewis,
Washington.

Charge: Violation of the Uniform
Code of Military Justice, Article 90.

Specification: In that Private First
Class (E-3), Joseph Parisi, U. S.
Army, U. S. Army Overseas Replacement
Station (attached Transient Company),
U. S. Army Personnel Center, having
received a lawful command from
Major Stanley M. Foscue, his superior
commissioned officer, to board the
aircraft, did, at McChord Air Force
Base, Tacoma, Washington, on or about
2145 hours, 9 January 1970, willfully
disobey the same.

PLEAS

As to the Specification and the

Charge: guilty.

FINDINGS

Of the Specification and the
Charge: guilty.

SENTENCE BY MILITARY JUDGE

To be dishonorably discharged from the service, to forfeit all pay and allowances, to be confined at hard labor for two years, and to be reduced to the grade of Private E-1. (No previous convictions considered.)

The sentence was adjudged on 8 April 1970.

ACTION

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY TRAINING
CENTER, INFANTRY AND FORT LEWIS
Fort Lewis, Washington 98433

2 July 1970

In the foregoing case of Private First Class (E-3) Joseph Parisi, SSAN: 048 34 0713, U. S. Army, U. S. Army Overseas Replacement Station (attached Transient Company), U. S. Army Personnel Center, Fort Lewis, Washington, the sentence is approved. The forfeiture shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a Court of Military Review. Pending completion of appellate review the

accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as competent authority may direct.

/s/ Willard Pearson
/t/ WILLARD PEARSON
Major General, USA
Commanding

GCMO No. 105, HQ, USATC, Inf. &
Ft Lewis, Ft Lewis, WA
dtd 2 Jul 70 (Cont)

BY COMMAND OF MAJOR GENERAL PEARSON:

OFFICIAL:

/s/ Charles L. Seng
CPT, JAGC
Act Asst AG

HARRY A. STELLA
Colonel, GS
Chief of Staff

DISTRIBUTION:

20-SJA, Ft Lewis, WA
1-Accused
1-COL Lee (MJ)
1-CPT Mavis (TC)
1-CPT Sullivan (DC)
2-CO, O/S Repl Sta, Ft Lewis, WA
2-CO, Pers Cen, Ft Lewis, WA
15-Cor Off, Post Stkd (for 201 file)
2-Cor Off, Post Stkd
4-Unit Pers Off
2-FAO, Ft Lewis, WA
2-G2, Ft Lewis, WA
1-Det A, 6th MP Gp (CI)
5-Comdt, USDB, Ft Leavenworth, KA 66027
1-CO, USA Pers Ser Sup Cen
ATTN: AGPE-F, Ft. Benj Harr, IN 46249
2-TPMG, DA, Washington, D.C. 20315
1-FCUSA, Indianapolis, IN 46249
1-CO, USAMPCIR, Ft Holabird, MD 21219
1-CG, Fifth Army

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25773

JOSEPH PARISI,

Appellant,

v.

MAJOR GENERAL PHILLIP B.
DAVIDSON, etc., et al..

Appellees.

Appeal from the United States
District Court for the Northern
District of California

Before: HAMLEY, ELY and CARTER,
Circuit Judges.

ELY, Circuit Judge:

This is an interlocutory
appeal, under 28 U.S.C. §1292(b),
from an Order of the District Court,
staying habeas corpus proceedings
brought under 28 U.S.C. §2241 until
trial and final determination of

court-martial charges then lodged against the appellant.

The complex history of the case is set out in detail in the margin.^{1/}

Briefly, Parisi is an army private who alleges that his application for discharge as a conscientious objector was denied by the army without a basis in fact for the denial. His petition was first presented to the District Court in November, 1969, but proceedings were stayed pending his administrative appeal to the Army Board for Correction of Military Records [ABCMR].^{2/} A partial preliminary injunction also issued, prohibiting Parisi's assignment to any duties which required materially greater participation in combat activity or training than was being required of him in his then duties.

Before the ABCMR's decision, however, Parisi was ordered to Viet Nam, where he was to perform noncombatant duties similar to those which had been assigned

to him and which he had been performing in this country. After unsuccessful attempts to win a stay of his redeployment order both from our court and from the Circuit Justice, Parisi chose, with all attendant risks, to disobey a military order to enplane for Viet Nam. Charges were then immediately filed against him, under U.C.M.J. art. 90, for failure to obey a lawful order.

Prior to the date set for court-martial, the ABCMR notified Parisi that it had ruled against his appeal. The District Court promptly ordered the Government to show cause why a writ should not then issue. In its return, the Government requested the stay Order in question, on the grounds that to permit concurrent federal court proceedings would constitute an unwarranted interference with the military court system.

The question is not an easy one,

but we have concluded that habeas proceedings were properly stayed pending the final conclusion of Parisi's military trial and his appeals therefrom.

The military, no less an agency of the federal government than the federal court system, has the equal responsibility to act consistently with the Constitution and laws of the United States.^{3/} While civilian courts are available to correct, in a proper case, abuses by military authorities,^{4/} they must be careful to avoid unwarranted interference with internal military matters.

"[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Orloff v. Willoughby, 345 U.S. 83, 93-94,
97 L. Ed. 842, 73 S. Ct. 534 (1953).

Thus, there is the general rule that:

"[H]abeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain."

Noyd v. Bond, 395 U.S. 683, 693,
22 L.Ed. 2d 631, 89 S. Ct. 1876 (1969).^{5/}

Parisi does not argue the wisdom and correctness of the exhaustion of administrative remedies doctrine as applied to military proceedings. He strenuously contends, however, that the doctrine was improperly applied in the court below.

First, Parisi argues that the doctrine applies only to administrative, not judicial remedies. The risk of imprisonment and dishonorable discharge inherent in military judicial proceedings, he claims, renders it unfair to require one first to assert his claims as defenses

at a military trial before being able, successfully, to initiate habeas proceedings in a federal civilian court.

In support of this argument, Parisi relies, primarily, upon Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968). There, it appears that the district judge expressly rejected Government contentions that a claim of wrongful detention in the military by an inservice conscientious objector must first be raised as a defense to court-martial, noting that

"[i]f [the Government's] contentions were to prevail, the only way one in petitioner's position could raise his constitutional claims of wrongful detention would be by first committing a crime and facing the possibility of imprisonment."

284 F. Supp. at 253.

However, assuming, arguendo, the correctness of Crane, the case is distinguishable. Crane was a sailor who deserted his ship after his application for conscientious

objector discharge was administratively denied, but before formal charges were brought against him in military court. We note the reasoning, on similar facts,^{6/} of Judge Kaufman in Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968):

"[A]lthough the government maintains that Hammond should present his claim as a defense to a court martial, it fails to explain wherein lies his power to convene the court martial that is supposedly to judge him. And, as Professor Jaffe posits, where '[o]ne must at his risk await such further enforcing procedure as the agency chooses to initiate *** the exhaustion doctrine is inapplicable; the person has no remedy.' Jaffee, *The Exhaustion of Administrative Remedies*, 12 Buff. L. Rev. 327, 329. (1963)"

398 F.2d at 714.

This reasoning is inapposite to Parisi's case, for when the District Court issued the Order here challenged, charges had then already been filed against Parisi by the military authorities,

the tribunal that was to judge him had already been convened, and the trial itself was imminent. Parisi was not under the burden of being required to commit a further military "crime" in order to provide himself with a forum. He had already done the act alleged to be unlawful. Thus, we cannot see that either Crane or Hammond supports Parisi's argument. ^{7/}

In Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968), an inservice conscientious objector was granted habeas relief during the pendency of his Article 90 courtmartial for failure to obey orders which were given after administrative denial of his application for conscientious objector discharge. But Gann relied solely on Crane and Hammond, supra, and we think that such reliance was misplaced. ^{8/}

Here, the District Court relied upon

In re Kelly, 401 F.2d 211 (5th Cir. 1968), wherein the Fifth Circuit upheld a stay order on facts very similar to those before us.^{9/}

Parisi's attempts to distinguish Kelly, arguing that there, habeas was invoked after formal court-martial charges were lodged, whereas he sought habeas before he committed the disobedience leading to the military charges against him.^{10/}

However, Parisi's November, 1969 petition was prematurely filed under our rule in Craycroft v. Farrell, 408 F.2d 587 (9th Cir. 1968), vacated and remanded, 397 U.S. 335 (1970). When the ABCMR ruled in March, 1970, satisfying the administrative exhaustion requirement, Parisi renewed his petition, as was proper, but he, at that time, was already facing court-martial. Thus, he is in the

same position as was Kelly in the Fifth Circuit.

We are not blind to the possible moral dilemma that Parisi faced. We cannot quarrel with the proposition that disobedience based on the dictates of religious conscience is based on "an obligation, superior to that due the state, of not participating in way in any form." United States v. Seeger, 380 U.S. 163, 172, 13 L.Ed. 2d 733, 85 S. Ct. 850 (1965). However, the District Court's injunction was reasonable and afforded ample protection for Parisi's religious scruples. Three judges of our court and our Circuit Justice found that the military order for Parisi's redeployment did not, in the circumstances, violate the District Court's protective order. While Parisi may honestly have disagreed, that disagreement cannot be held to have justified his unilateral determination to defy

his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise similar discretion, necessary military discipline would collapse. Had Parisi bided his time, it appears, on the record before us now, that he likely would have obtained the relief he sought from the District Court. If the fruits of his impatience are bitter, he has only himself to blame for production.

A serviceman facing court-martial should not be permitted habeas relief in a federal court during the pendency of his military trial and appeals therefrom, except, perhaps, when it might appear that no military tribunal to which he has recourse is capable of granting an appropriate remedy.

If possible anticipation of this qualified conclusion, Parisi argues that

the relief he sought in the District Court is in fact elsewhere unavailable. This argument is based on two grounds. First, Parisi asserts that denial of an application for conscientious objector discharge without a basis in fact is not recognized as a defense to an Article 90 court-martial. Second, he argues that even if his claim were a good defense, and established to the satisfaction of the military court, the only remedy he could there expect would be acquittal, not the honorable discharge that might be ordered by a District Court.

Were this true, we would hesitate to subject Parisi to the rigors of a fruitless series of appeals; however, we are not convinced that he is correct in his interpretation of the existing state of military law.

Parisi supports the first of the arguments now under discussion only by

his interpretation of certain of the rulings of the military judge at his court-martial. ^{11/} It appears to us, however, that if error in the military court is indicated, it is not that the military judge refused to review the merits of Parisi's conscientious objector claim, but that he may have adopted an improperly narrow standard for review thereof. This is surely an appropriate point to present to the military's appellate tribunals, and we are referred to no case from the Court of Military Appeals, the highest military court, indicating that an appropriate constitutional standard will not be ^{12/} required.

Parisi is also unable to support his contention that the military appellate tribunals are unable to grant him a discharge no matter what his defense is. We are not now

prepared to assume that, if it is determined that Parisi's application for discharge was denied without basis in fact, an error of such constitutional magnitude cannot be rectified by a reviewing court within the military system. ^{13/} If it should eventually come to pass that the military courts will not apply those constitutional principles which must control their decisions, as well as ours, Parisi may then bring that fact to the attention of the District Court.

Affirmed.

United States Circuit Judges

Footnote 1/

Joseph Parisi was drafted on August 22, 1968. According to the in-service conscientious objector application he filed with the Army on May 22, 1969 (pursuant to Army Regulation (AR) 635-20), Parisi had doubts at the time of his induction about his feelings toward military service. However, his beliefs did not coalesce into conscientious objection until he was well down the road of basic training and initial duty assignment (Psychological social work and counseling). His application, which was made prior to issuance of any order for redeployment to a combat station, also stated that his Army experiences to that point led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his

Christian beliefs.

The initial interviews mandated by AR 635-20 uniformly terminated in Parisi's favor; the base Chaplain, the base psychiatrist, and the special hearing officer (as well as Parisi's immediate supervisor) all attested to the sincerity and religious nature of Parisi's conscientious objection to military service. According to the record, the Commander of the Army hospital at Parisi's base as well as the Commanding General of his training center also recommended approval of the application, although they did not interview Parisi personally. However, Parisi's immediate commanding officer, Captain Hubman, recommended disapproval, with the notation, "Consider application contrary to paragraph 3b(3) AR 635-20." This paragraph provides that conscientious

objector applications will not be favorably considered when:

"(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code."

Captain Hubman had not interviewed Parisi nor had he engaged in any conversations with Parisi about the latter's religious beliefs and convictions.

In November, 1969, the Department of the Army denied Parisi's application. That office noted two reasons for its decision: (1) that Parisi's professed beliefs became fixed prior to entering the service, and (2) that Parisi was not truly opposed to all war due to his religious beliefs, as demonstrated by his attempts thus far to support it.

Parisi then applied to the Army Board for Correction of Military Records (ABCMR) for review of the denial of his

discharge. Shortly thereafter, on November 28, 1969, he applied to the United States District Court for the Northern District of California for a writ of habeas corpus. He therein sought discharge from the Army as a conscientious objector.

In his habeas petition Parisi claimed that there was no basis in fact for the grounds cited by the Department of the Army in denying his application for a discharge.

In addition, Parisi sought a preliminary injunction pending disposition of the proceeding to prevent respondents from: (1) requiring him to obey an order of August 8, 1969, to undergo training preparatory to being transferred to Viet Nam for duty; and (2) transferring him outside the jurisdiction of the District Court

where the proceeding was commenced.

On the day the petition was filed, the District Court, after a hearing, entered an Order enjoining respondents from assigning Parisi to any duties which required materially greater participation in combat activity or training than was being required of him in his then present duties. This Order was to remain in effect pending decision by the ABCMR on Parisi's application to it for discharge as a conscientious objector.

The district court order recites that the court would retain jurisdiction of the case until the ABCMR made its decision. The Order also denied Parisi's application for a preliminary injunction against his transfer out of the Northern District of California. On December 4, 1969, Parisi took an interlocutory appeal (No. 25,133 in this

court) from the Order denying his requested preliminary injunction.

About this time, Parisi received orders to process out of his then duty station at Fort Ord, California, and, following training, to report to the Overseas Replacement Station at Oakland, California, on December 31, 1969. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Parisi then moved in this court for an order staying his deployment outside the Northern District of California pending disposition of his appeal.

Three other judges of our court denied the motion on December 10, 1969, "on condition that Respondents produce Appellant in this district if the appeal results in his favor." On December 29, 1969, the Circuit Justice denied a similar application for a stay.

Parisi reported, on December 31,

1969, as directed, to the United States Army Personnel Center, Fort Lewis, Washington. At that time he requested an opportunity to file a second application for discharge as a conscientious objector. As required by AR 635-20, he was given seven days to complete his application. However, on January 6, 1970, Parisi advised the authorities at the Personnel Center that he no longer wished to make out an application. Accordingly, he was booked for transportation overseas.

Parisi then refused to obey a military order to board a plane for Viet Nam. He was immediately charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C. §890, and was confined to the Post Stockade, pending disposition of the charge against him.

On March 2, 1970, while Parisi's court-martial was pending, the ABCMR notified Parisi of its rejection of his application for relief from the Army's denial of his discharge request.

Four days later the District Court, pursuant to Parisi's habeas petition, entered an Order requiring respondents (appellees in this appeal) to show cause why a writ should not be issued. The United States responded by moving in the District Court for a stay of the habeas proceedings pending exhaustion of Parisi's military judicial remedies.

At this point Parisi suggested to a panel of judges of our court that the first interlocutory appeal he had taken from his habeas proceeding (No. 25,133 in this court, above) should be dismissed as moot. As noted, the ABCMR had by this time denied him relief, and, since he was incarcerated

at Fort Lewis, there was no remaining need for an injunction to keep him in this country. We entered the requested Order, dismissing the first appeal, on March 17, 1970.

On March 31, 1970, responding to the Government's motion that it abstain pending completion of Parisi's court-martial proceedings, the District Court entered an Order staying its consideration of Parisi's habeas petition until there was a trial and a final judgment in the military courts on the court-martial charges.

The District Court did not stay the court-martial proceedings pending our consideration of the interlocutory appeal, nor have we done so; consequently, in the interim between the date of the district court order, March 31, 1970, and the date of our

acceptance of the appeal, April 24, 1970, Parisi was, on April 8, 1970, court-martialed and convicted of the charge against him. He is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. We have been advised that his appeal before the Court of Military Review is now pending.

Footnote 2/ (Reference page 1)

This is the exhaustion requirement deemed controlling in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). See also Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969); Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969).

In Craycroft's appeal before the Supreme Court, the Solicitor General conceded that the administrative remedies which our court had required to be exhausted were either unavailing or had already been exhausted. 397 U.S. at 335.

Footnote 3/ (Reference page 2)

Craycroft v. Ferrall, 408 F.2d 587, 595 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970).

Footnote 4/ (Reference page 2)

See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

Footnote 5/ (Reference page 3)

This rule was established by Gusik v. Schilder, 340 U.S. 128 (1950).

There, Mr. Justice Douglas, speaking for a unanimous Court, more precisely expressed the rationale for this result:

"An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a

state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of (the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile."

Id. at 131-32. The deference thus deemed appropriate is not demanded by our court's jurisdictional limitations, but by sound considerations of comity.

Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); In re Kelly, 401 F.2d 211 (5th Cir. 1968). So, in an appropriate case, habeas may be entertained without strict adherence to the exhaustion

requirement. In re Kelly, supra.

We have apparently not dealt with the precise exhaustion question raised by this appeal. We declined to consider the issue in Craycroft v. Ferrall, 408 F.2d 587, 589 n.1 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). There we

" . . . distinguish[ed] our analysis of the exhaustion [of administrative remedies] problem from cases in which, once military administrative remedies have been exhausted, in-service conscientious objectors were allowed to seek civil relief before enduring court-martial proceedings and exhausting possible appeals therefrom."

Id. at 589 n.1 (citations omitted).

Last term the Supreme Court also declined to resolve the question whether in-service conscientious objectors who have exhausted administrative remedies must also undergo court-martial proceedings before seeking habeas relief, although it noted that the

Circuits have divided on the issue.

Noyd v. Bond, 395 U.S. 683, 685 n.1
(1969) (citing cases).

Footnote 6/ (Reference page 4)

Hammond's application for discharge from the Navy on conscientious objector grounds had been denied before habeas was sought, but no military charges were then pending against him.

Footnote 7/ (Reference page 4)

The distinction drawn herein was implicitly recognized in Hammond, where the Second Circuit distinguished Gusik on the grounds that Gusik "had already been courtmartialled and the Court simply concluded that once that route had been traversed, it was incumbent upon him to exhaust his appeal . . ." 398 F.2d at 713.

Footnote 8/ (Reference page 5)

Parisi also relies on Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969) and Cooper v. Barker, 291 F. Supp. 952

(D. Md. 1968). These cases, however, present no new considerations.

Footnote 9/ (Reference page 5)

Kelly was an inservice conscientious objector court-martialed for wilful disobedience of a superior officer. He brought habeas proceedings during the pendency of his court-martial.

Footnote 10/ (Reference page 5)

Parisi also asserts that Kelly rested, in part, on the court's conclusion that there was little chance of Kelly's success on the merits of his petition in the District Court.

Footnote 11/ (Reference page 6)

"Well, I do not read Noyd the way you do as requiring that I make a decision and a determination of the basis in fact other than to examine the entire file and the entire record, and in my view determine

whether or not the ruling of the Secretary of the Army was arbitrary, capricious, unreasonable, or an abusive [abuse of?] discretion. Now, that may be saying in different words that I am ruling on the basis in fact. I'm not sure about that. But I do not consider that to be -- and I want the record to so reflect, so that you may have an opportunity to get a definite ruling on it -- that I am not ruling solely as a basis of fact. I am ruling that I have examined this document. I have studied it. I find it conforms to AR 635-20. There has been no deprivation of administrative due process and I find from the examination of this record that the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive

[abuse of?] discretion."

Footnote 12/ (Reference page 7)

In fact, Parisi himself argued at his court-martial that United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 S.S.L.R. 3218 (1969) had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of the lawfulness of the order alleged to have been disobeyed.

United States v. Wilson, 2 S.S.L.R.

3548 (U.S.C.M.A. 1969) is not contrary.

There, the accused had refused an order to put on his uniform, was court-martialed, and the following instruction was given by the law officer: " . . . /Personal scruples or qualms, whether based upon religious convictions, personal philosophy, or otherwise, are no defense to the offense of wilful disobedience of the

order as alleged"

In upholding this instruction, the Court of Military Appeals remarked:

"As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience."

2 S.S.L.R. at 3548. However, Noyd seems to make it clear that a defendant's religious convictions are admissible on the issue of the lawfulness of the order allegedly disobeyed. If he were erroneously denied discharge as a conscientious objector, some type of subsequent orders, obviously conflicting with his religious convictions, could be unlawful:

"Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation [as a conscientious objector] had been denied. The

validity of the order, therefore, depended on the validity of the Secretary's decision If the Secretary's decision was illegal, the order it generated was also illegal."

United States v. Noyd, supra at 3221.

Thus, Wilson merely stands for the proposition that an inservice conscientious objector must obey "lawful" orders, not all orders. See also United States v. Dunn, 38 C.M.R. 917 (1968); United States v. Taylor, 37 C.M.R. 547 (1966).

In this connection, we think the legality of any such subsequent military order could not be determined without consideration of its nature, in scope and magnitude. Obviously, an inservice objector, remaining in the service pending the review of the denial of his claim for discharge should not be permitted to defy, for example, an order to report for muster and drill or an order to maintain himself and his

quarters cleanly and neatly. Here, again, we note that the District Court had protected Parisi against exposure to violence. Cf. Kemble v. Commandant, 12th Naval Dist., ___ F.2d ___ (9th Cir. Feb. 25, 1970).

Footnote 13/ (Reference page 7)

The All Writs Act, 28 U.S.C. §1651(a), has been held to permit a military court to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction."

United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

The military court's power to issue emergency writs of habeas corpus is well-settled. Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25773

JOSEPH PARISI,

Appellant,

v.

MAJOR GENERAL PHILLIP B.
DAVIDSON, etc., et al.

Appellees.

JUDGMENT

APPEAL from the United States
District Court for the Northern
District of California.

THIS CAUSE came on to be
heard on the Transcript of the
Record from the United States
District Court for the Northern
District of California and was
duly submitted.

ON CONSIDERATION WHEREOF, It

is now here ordered and adjudged by
this Court, that the judgment of
the said District Court in this

Cause be, and hereby is affirmed.

A TRUE COPY

JUN 2 1971

ATTEST

WM. B. LUCK, CLERK

By R. D. Hewitt

Deputy

Filed and entered Dec. 3, 1970

The Court today took the
following action in the above case:

"The motion to dismiss with
prejudice the petition and the
petition for a writ of
certiorari are granted. The
motion to advance oral argument
is denied."

Enclosed is a memorandum
describing the time requirements
and procedures under the Rules.

The additional booking fee
of \$20, Rule 25(a), is due and payable.

Very truly yours,

E. ROBERT SAWYER, Clerk
by /s/ Helen K. Longman
(Mrs. Helen K. Longman)
Assistant Clerk

LR MAIL
ENCLOSURES

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 3, 1971

E. ROBERT SEAVER
Clerk of the Court

Douglas M. Schwab, Esq.
44 Montgomery Street
Suite 3000
San Francisco, California 94104

RE: PARISI v. DAVIDSON
No. 1413, O.T. 1970

Dear Mr. Schwab:

The Court today took the following action in the above case:

"The motion to dispense with printing the petition and the petition for a writ of certiorari are granted. The motion to advance oral argument is denied."

Enclosed is a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of \$50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
by /s/ Helen K. Loughram
(Mrs.) Helen K. Loughram
Assistant Clerk

AIR MAIL
Enclosures

INDEX

Page

| | |
|---|----|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statute Involved | 2 |
| Statement of Facts | 3 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 19 |

CITATIONS

CASES:

Page (s)

| | |
|--|---------------|
| Cooper v. Barker 291 F. Supp. 952 (D. Md. 1968) | 10,12,15 |
| Crane v. Hedrick 284 F.Supp. 250 (N.D. Cal. 1968) | 12,15 |
| Craycroft v. Farrell 397 U.S. 335 (1970) | 7,15 |
| Craycroft v. Farrell 408 F.2d 587 (9th Cir. 1969) | 7,11,12,15,16 |
| Ex parte Hawk 321 U.S. 114 (1944) | 14 |
| Fay v. Noia 372 U.S. 391 (1963) | 8 |
| Gann v. Wilson 289 F.Supp. 191 (N.D. Cal. 1968) | 9,12,15 |
| Gusik v. Schilder 340 U.S. 128 (1950) | 13 |
| Hammond v. Lenfest 398 F.2d 705 (2nd Cir. 1968) | 9,12,15,16 |
| In re Kelly 401 F.2d 211 (5th Cir. 1968) | 15 |
| Jeffers v. Whitley 309 F.2d 621 (4th Cir. 1962) | 10 |
| Kreiger v. Terry 413 F.2d 73 (9th Cir. 1969) | 3,16 |
| Lee v. Pearsen 18 U.S.C.M.A. 545 (1968) | 11,12 |
| McKart v. United States 395 U.S. 185 (1969) | 9,11,16,17,18 |
| McNeese v. Board of Education 373 U.S. 668 (1963) | 10 |
| Mooney v. Holohan 294 U.S. 103 (1935) | 14 |
| Noyd v. Bond 395 U.S. 603 (1969) | 7,12,13,14,15 |

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B.
DAVIDSON, Commanding General,
United States Army Training
Center, Fort Ord, California;
CAPTAIN COUGHLIN, Commanding
Officer, Hospital Company,
United States Army Training
Center, Fort Ord, California;
STANLEY RESOR, Secretary of
the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to
review the order of the United States Court of Appeals for the

1 Ninth Circuit, entered in the above-entitled case on December 3,
2 1970.

3 CITATIONS TO OPINIONS BELOW

4 The opinion of the Ninth Circuit Court of Appeals has
5 not yet been reported in any official or unofficial reports, but
6 a copy of the court's opinion, as served upon counsel, is
7 attached hereto as Appendix A. A copy of the District Court's
8 Order Staying Proceedings and Certifying for Interlocutory Appeal
9 is attached hereto as Appendix B.

10 JURISDICTION

11 The opinion and order sought to be reviewed were
12 entered on December 3, 1970 in action number 25773 in the United
13 States Court of Appeals for the Ninth Circuit. The jurisdiction
14 of the United States Supreme Court is asserted under 28 U.S.C.
15 § 1254(1).

16 QUESTION PRESENTED

17 Where a member of the Armed Forces who has been
18 denied discharge as a conscientious objector applies to the
19 federal district court for a writ of habeas corpus and is there-
20 after charged by military authorities with refusing to obey
21 an order, is it proper for the federal district court to stay
22 all proceedings in the habeas corpus proceedings pending
23 exhaustion of military judicial remedies, including appeals?

24 STATUTE INVOLVED

25 The applicable statute is 28 U.S.C. § 2241(a). It
26 provides in pertinent part as follows:

1 "Writs of habeas corpus may be granted by the
2 Supreme Court, any justice thereof, the district
3 courts and any circuit judge within their
4 respective jurisdictions...."

5 STATEMENT OF FACTS

6 The following statement of facts is taken substantially
7 from the opinion of the Court of Appeals.

8 y Petitioner was drafted on August 22, 1968. Pursuant
9 to Army Regulation 635-20, he filed an application for discharge
10 as a conscientious objector on May 22, 1969, before receiving
11 orders for shipment to Viet Nam.

12 The initial interviews mandated by AR 635-20 uniformly
13 terminated in Petitioner's favor. However, in November, 1969, the
14 Department of the Army denied Petitioner's application. That office
15 noted two reasons for its decision: (1) that Petitioner's professed
16 beliefs became fixed prior to entering the service, and (2) that
17 Petitioner was not truly opposed to all war due to his religious
18 beliefs, as demonstrated by his attempts thus far to support it.

19 Parisi then applied to the Army Board for Correction of
20 Military Records (ABCMR) for review of the denial of his dis-
21 charge. Shortly thereafter, on November 28, 1969, he applied to
22 the United States District Court for the Northern District of
23 California for a writ of habeas corpus.^{1/} He therein sought
24 discharge from the Army as a conscientious objector.

25 In his habeas petition Petitioner claimed that there
26 was no basis in fact for the grounds cited by the Department of
27

28 ^{1/} The procedure by which Petitioner sought habeas corpus
29 shortly after applying to the ABCMR has been recognized as a proper
30 method to invoke the jurisdiction of the federal court, particularly
31 where temporary stay orders are necessary or appropriate. Krieger
32 v. Terry, 413 F.2d 73 (9th Cir. 1969).

1 the Army in denying his application for a discharge. In addition,
2 Petitioner sought a preliminary injunction pending disposition
3 of the proceeding to prevent respondents from: (1) requiring him
4 to obey an order of August 8, 1969, to undergo training prepara-
5 tory to being transferred to Viet Nam for duty; and (2) transfer-
6 ring him outside the jurisdiction of the District Court where
7 the proceeding was commenced.

8 On the day the petition was filed, the District Court,
9 after a hearing, entered an Order enjoining respondents from
10 assigning Petitioner to any duties which required materially
11 greater participation in combat activity or training than was
12 being required of him in his then present duties.. This Order
13 was to remain in effect pending decision by the ABCMR on
14 Petitioner's application to it for discharge as a conscientious
15 objector.

16 The district court Order recites that the court would
17 retain jurisdiction of the case until the ABCMR made its
18 decision. The Order also denied Petitioner's application for a
19 preliminary injunction against his transfer out of the Northern
20 District of California. On December 4, 1969, Petitioner took an
21 interlocutory appeal (No. 25,133 in the Court of Appeals for the
22 Ninth Circuit) from the Order denying his requested preliminary
23 injunction.

24 About this time, Petitioner received orders to process
25 out of his then duty station at Fort Ord, California, and,
26 following training, to report to the Overseas Replacement Station

1 at Oakland, California, on December 31, 1969. This was later
2 changed to the United States Army Personnel Center, Fort Lewis,
3 Washington. Petitioner then moved in the Court of Appeals for an
4 order staying his deployment outside the Northern District of
5 California pending disposition of his appeal.

6 The Court of Appeals denied the motion on December 10,
7 1969, "on condition that Respondents produce Appellant [Petitioner]
8 in this district if the appeal results in his favor". On
9 December 29, 1969, Mr. Justice William O. Douglas denied a similar
10 application for a stay.

11 Petitioner reported, on December 31, 1969, as directed,
12 to the United States Army Personnel Center, Fort Lewis, Washington,
13 and he was booked for transportation overseas. He then refused to
14 obey a military order to board a plane for Viet Nam.^{2/} He was
15 immediately charged with violating Article 90 of the Uniform Code
16 of Military Justice, 10 U.S.C. § 890, and was confined to the Post
17 Stockade, pending disposition of the charge against him.

18 On March 2, 1970, while Petitioner's court martial was
19 pending, the ABCMR notified him of its rejection of his appli-
20 cation for relief from the Army's denial of his discharge request.
21 Four days later the District Court, pursuant to Petitioner's
22 habeas petition, entered an Order requiring respondents to show
23 cause why a writ should not be issued. The United States
24 responded by moving in the District Court for a stay of the
25 habeas proceedings pending exhaustion of Petitioner's military

26

2/ As Parisi stated in his affidavit in the District Court,
for him the duties in Viet Nam involved far more serious violation

1 judicial remedies.

2 On March 31, 1970, responding to the Government's
3 motion that it abstain pending completion of Petitioner's court
4 martial proceedings, the District Court entered an Order staying
5 its consideration of Petitioner's habeas petition until there
6 was a trial and a final judgment in the military courts on the
7 court martial charges. Petitioner appealed to the Court of
8 Appeals, in action number 25773, from the District Court's stay
9 order.

10 The District Court did not stay the court martial
11 proceedings pending the Court of Appeals' consideration of the
12 interlocutory appeal, nor did the Court of Appeals; consequently,
13 in the interim between the date of the District Court Order,
14 March 31, 1970, and the date of the acceptance of the appeal by
15 the Court of Appeals, April 24, 1970, Petitioner was, on April 8,
16 1970, court martialed and convicted of the charge against him.
17 He is presently confined in the United States Army Disciplinary
18 Barracks, Fort Leavenworth, Kansas, serving a sentence of two
19 years at hard labor, with dishonorable discharge. His appeal
20 before the Court of Military Review is now pending.

21 On December 3, 1970, the Court of Appeals for the
22 Ninth Circuit, in action number 25773, affirmed the District
23 Court's stay order. It is that affirmance which is sought to
24

25 2/. (Continued) of his religious beliefs. That is because the
26 psychological counseling there would involve direct participation
in and supporting of combat activities and helping to prepare
soldiers for battle, and he could also be required at any time to
participate directly in combat and weapons carrying.

1 be reviewed in this petition for a writ of certiorari.

2 REASONS FOR GRANTING THE WRIT

3 This case presents fundamental, and unresolved,
4 questions concerning the doctrine of exhaustion of remedies and
5 the circumstances in which the courts are available to test the
6 legality of confinement in matters touching important personal
7 liberties. In particular these proceedings again raise the
8 issue of what remedies an in-service conscientious objector
9 applicant must exhaust before being permitted to obtain review
10 of an administrative denial of his application on habeas corpus
11 in the federal district courts. As such, this case poses
12 significant issues analogous to those previously before this
13 Court, but not reached in Craycroft v. Farrell, 397 U.S. 335
14 (1970), vacating and remanding, 408 F.2d 587 (9th Cir. 1969)
15 and Noyd v. Bond, 395 U.S. 603, 685(n.1) (1969). The issues
16 vitally affect the personal and religious freedom of
17 innumerable persons who are subject to military jurisdiction
18 against claims of conscience.

19 1. The Writ Should be Granted Because the Decision
20 Below has Extended the Doctrine of Exhaustion in an Unprece-
21 dented and Erroneous Manner. The holding of the court below -
22 that a conscientious objector applicant, whose administrative
23 request for discharge has been denied, and who then disobeys
24 orders for shipment to a combat zone because he believes those
25 orders to violate his religious beliefs, must exhaust all
26 military judicial remedies, including appeal, before bringing

1 habeas corpus in the civilian courts.- renders substantially
2 nugatory the opportunity for civilian judicial review of such
3 denials.. Under that holding, persons such as Petitioner Parisi
4 will be deprived of access to the courts for much if not all of
5 their military term, while their criminal case winds slowly
6 through the military judicial system.^{3/} At best, therefore,
7 such decision raises an issue of momentous import in a country
8 which has been involved for the last decade in an increasingly
9 unpopular war and where claims of conscientious objection to
10 participation in the military are substantially increasing.
11 More, the irony of the court's holding below is that the right of
12 access to the courts through the "great writ" of habeas corpus
13 (Fay v. Noia, 372 U.S. 391 (1963)), will be denied to those
14 persons whose scruples against the military are strongest - i.e.,
15 persons who refuse to cooperate with the military and are willing
16 to risk military punishment and confinement rather than violate
17 their religious and moral principles.

18

19

20
21 ^{3/} Although there are no published studies of which Peti-
22 tioner is aware, we believe this Court can take judicial notice
23 that exhaustion of the court martial and appellate remedies is a
24 relatively slow process at best. More, there are additional
25 administrative steps which an "in-service" applicant must exhaust
26 in any event under military regulations before seeking civilian
judicial review. Compare also the empirical studies referred
to by the Fourth Circuit in U.S. ex. rel. Brooks v. Clifford, 412
F.2d 1137 (4th Cir. 1969) which determined that applications to
the Army Board for the Correction of Military Records ("ABCMR")
take, on the average, more than four months to process.

1 While Petitioner fully recognizes the important prin-
2 ciple of administrative exhaustion and the reluctance of civilian
3 courts to inject themselves too broadly into military affairs,
4 Orloff v. Willoughby, 345 U.S. 83 (1953), we would submit that
5 neither principle need be compromised by a reversal of the
6 decision below. To the contrary, fairly considered, Petitioner
7 seeks only a reasoned accommodation between these principles,
8 which will permit the continued effectiveness of the military's
9 administrative and judicial systems yet would preserve the vital
10 right of access to the courts to test deprivations of fundamental
11 constitutional rights. McKart v. United States, 395 U.S. 185
12 (1969).

13 Although nominally involving a procedural issue,
14 Petitioner submits that the significance of the holding below is
15 so great as to substantially undercut the right to civil review
16 of alleged unconstitutional denials of requests for conscientious
17 objector discharge. It is by now settled that at least where a
18 serviceman is denied discharge as a conscientious objector with-
19 out basis in fact he is deprived of due process and may obtain
20 his release through habeas corpus. Hammond v. Lenfest, 398 F.2d
21 705 (2nd Cir. 1968); United States ex. rel. Brooks v. Clifford,
22 409 F.2d 700 (4th Cir. 1969); Gann v. Wilson, 289 F.Supp. 191
23 (N.D. Cal. 1968).

24 However, given the admitted fact that such claimants
25 are by and large subject to only limited periods of service, the
26 value of the right to civilian review of such military action is

1 no greater than the availability of reasonably prompt access to
2 the courts. If the path to the courthouse door is strewn with
3 too many obstacles, or is simply over-long, the fact that relief
4 is theoretically available is of little practical consequence.
5 See e.g., McNeese v. Board of Education, 373 U.S. 668 (1963);
6 Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962); Sunshine
7 Publishing Co. v. Summerfield, 184 F.Supp. 767 (D.D.C. 1960).
8 Compare also Note, Judicial Acceleration of the Administrative
9 Process: The Right to Relief from Unduly Protracted Proceedings,
10 72 YALE L.J. 574 (1963). Petitioner submits that recent
11 decisions, particularly in the Ninth Circuit (including, of
12 course, the instant case) have placed excessive and improper
13 obstacles in the path of persons seeking discharge through
14 federal habeas corpus. He would further urge that what is
15 therefore needed - at this time and from this Court^{4/} - is review
16

17 ^{4/} Review in this Court is required, if for no other reason,
18 by the fact that the decision below is squarely in conflict with
19 District Court decisions in Talford v. Seaman, 306 F.Supp. 941
20 (D. Md. 1969) and Cooper v. Barker, 291 F.Supp. 952 (D. Md. 1968).
21 In Talford, the District Court granted Habeas Corpus relief to an
22 in-service conscientious objector, even though at the time of the
23 Habeas Corpus hearing, there were pending court martial pro-
24 ceedings at which petitioner could presumably have raised wrongful
25 denial of his application for discharge as a conscientious
26 objector as a defense. Similarly, in Cooper, the court granted
Habeas Corpus relief to an in-service conscientious objector
despite pending court martial proceedings. The court ruled that
the right to defend a court martial was not a remedy within the
meaning of the exhaustion doctrine. Although the court in
Cooper noted that the question of whether wrongful denial of
discharge as a conscientious objector could be a defense to a
court martial proceeding was at the time unresolved, it further
stated that "under this court's view of the pending case, it is
not necessary to decide this question". 291 F.Supp. at 960 n.11.

1 and redefinition of the military remedies which must properly be
2 exhausted before the merits of constitutional claims may be heard
3 and resolved in the federal district courts.

4 If the writ is granted, Petitioner would urge a funda-
5 mental distinction: between (1) exhaustion of procedures designed
6 to provide the very remedy being sought in the habeas proceedings
7 (here discharge as a conscientious objector) and (2) exhaustion of
8 procedures (here court martial) not so designed and in which such
9 remedy is unavailable, or, at best, ancillary.^{5/} Thus, it is
10 admitted that prior to seeking habeas corpus relief Petitioner
11 Parisi - as all others similarly situated - was required to make
12 administrative application within the military for discharge as
13 a conscientious objector and await action thereon.^{6/} A far
14 different situation, however, is presented by the requirement,

15
16 ^{5/} It is highly questionable whether the remedy required
17 below has even the possibility of granting the relief sought by
18 way of habeas corpus. See U.S. v. Noyd, 18 U.S.C.M.A. 483,
19 489 n.1 (1969); Lee v. Pearsen, 18 U.S.C.M.A. 545 (1968). We
20 also note that where, as in Petitioner's court martial, there
21 are a number of assignments of error unrelated to the claim of
22 conscientious objection, the conviction could be reversed and
23 the case retried without obtaining a ruling on the conscientious
24 objection claim.

25 ^{6/} In addition to the direct application procedures provided
26 under AR 635-20, at least the Ninth Circuit has held that an
applicant for conscientious objector discharge must exhaust
remedies by seeking review in the Army Board for Correction of
Military Records. See, e.g. Craycroft v. Farrell, supra. Al-
though whether such exhaustion is properly required need not be
determined herein, we would note that such holding is, at best,
questionable in light of the subsequent decision of this Court
and the vacating and remanding Craycroft and the Fourth Circuit's
second decision in United States ex. rel. Brooks v. Clifford, 412
F.2d 1137 (4th Cir. 1969) relying upon this Court's opinion in
McKart v. United States, 395 U.S. 185 (1969). See also dis-
cussion infra at 15.

1 imposed below, of exhaustion of military judicial remedies through
2 court martial and military appellate proceedings - a distinction
3 which has seemingly been recognized in holdings or dicta in
4 numerous decisions prior to the ruling below. See, e.g. Hammond v.
5 Lenfest, supra; Talford v. Seaman, supra; Cooper v. Barker, supra;
6 Gann v. Wilson, supra; Crane v. Hedrick, 284 F.Supp. 250 (N.D.
7 Cal. 1968). Compare also Craycroft v. Farrell, supra [408 F.2d]
8 at 589 n.1 and Noyd v. Bond, supra at 685 n.1. Courts martial
9 are not regularly convened to pass upon denial of conscientious
10 objector applications, but are military judicial tribunals which
11 consider charges of criminal violations of military law. In fact,
12 the sole nexus of such bodies to assertions of conscientious
13 objection is the fact that a serviceman may claim in defense of a
14 charge of refusal to obey orders that the order given was unlawful
15 because of wrongful denial of his application for discharge as a
16 conscientious objector. Thus, here, Petitioner (believing that
17 his Viet Nam shipment orders violated the dictates of his con-
18 science) refused them and raised wrongful denial of his discharge
19 application as a defense to his court martial. Whether, assuming
20 the defense had been accepted, the military court had the power to
21 order discharge remains an open question. Cf. U.S. v. Noyd,
22 supra; Lee v. Pearsen, supra.

23 In short, the form and species of relief potentially
24 available through the military judicial system is, at best,
25 ancillary to the administrative processing of claims for con-
26 scientious objector discharge which Parisi had fully pursued, and

1 which formed the basis for his habeas corpus action now stayed by
2 the courts below. In such circumstances, Petitioner would propose
3 to argue that neither the policies underlying the so-called
4 "exhaustion" doctrine nor the reluctance of the courts to become
5 precipitously involved in military affairs, justifies a require-
6 ment that an in-service conscientious objector applicant pursue
7 the full course of military judicial proceedings before seeking
8 civil review of the administrative denial of his discharge
9 application.

10 The test which Petitioner would propose to urge before
11 this Court would uphold the integrity of the military processes
12 while leaving open the doors of the civil courts to persons who
13 have diligently pursued their applications for discharge through
14 the requisite phases of administrative processing within the
15 Service. More, consideration and reversal of the decision below
16 will prevent future discharge applicants from facing the
17 unconscionable choice between firmly held religious beliefs and
18 the right to have such beliefs tested in a civil court of law.^{7/}

19 Although we do not purport to deal exhaustively with
20 such cases in the instant petition, we would note that the
21 decisions in Gusik v. Schilder, 340 U.S. 128 (1950) and Noyd v.
22

23 ^{7/} Cf. Sherbert v. Verner, 374 U.S. 398 (1963). The irony
24 of Petitioner's case is that even the Court of Appeals in its
25 opinion below recognized that in all probability Parisi would
26 have succeeded on the merits of his application for Habeas
Corpus relief. Opinion at 6. Yet he has never had the chance
to present his claim on the merits.

1 Bond, supra - as well as the so-called "state habeas" cases
2 from which these decisions derive - are fully consistent with the
3 position Petitioner would propose to assert in this Court. In
4 each of such cases, the federal habeas corpus petitions sought
5 relief of the precise type which the other forums were intended
6 and able to provide. Thus, for example, in both Gusik and
7 Novd, petitioner asked the courts to intervene directly in
8 pending military judicial proceedings (prior to any appeal
9 therefrom) in order to consider claims which arose directly out
10 of the military criminal prosecutions and did not give rise to,
11 or involve, any independent claim for habeas relief. Similarly,
12 the requirement that state prisoners must exhaust all collateral
13 remedies in the state courts before seeking release on habeas
14 corpus in federal district court simply reflects the fact that
15 such state procedures are directly intended to treat claims of
16 unlawful detention in the respective state judicial systems.
17 See, e.g. Ex parte Hawk, 321 U.S. 114 (1944); Mooney v. Holohan,
18 294 U.S. 103 (1935).

19 By contrast here, Petitioner's habeas corpus petition
20 relates solely to the denial of his administrative request for
21 discharge as a conscientious objector. As pertains to that
22 claim, the subsequent court martial for disobedience of a lawful
23 military order was not only ancillary but essentially random.^{8/}

24
25 ^{8/} The procedure is in fact random, at least viewed in the
26 perspective of the traditional rationale for the exhaustion
requirement, vis, non-interference and deferral to other tribunals
with presumed expertise. Plainly, such rationale, if apposite
to the military judicial proceedings, would require that the

1 2. The Writ Should Be Granted Because The Decision
2 Below Is In Conflict With Other Decisions In The Federal District
3 And Appellate Courts And Appears Contrary To The Rationale Of
4 This Court's Decision In McKart v. United States. The issue
5 squarely presented by the instant proceedings has been before
6 the courts, in varying forms, in numerous recent cases.^{9/} More,
7 the question of exhaustion in the context at bar has given rise
8 to a welter of conflicting holdings and dicta which undeniably
9 call for clarification from the only forum capable of bringing
10 order to this area of the law. Thus, without discussing such
11 decisions in detail here, we would point out that claims that
12 military judicial remedies must be exhausted have been accepted
13 in the instant case and (arguably) in In re Kelly, 401 F.2d
14 211 (5th Cir. 1968), have been directly rejected in Telford
15 v. Seaman, supra and rejected in dicta in Hammond v. Lenfest,
16 supra, Cooper v. Barker, supra, Gann v. Wilson, supra and
17 Crane v. Hedrick, supra.^{10/} Cf., Craycroft v. Farrell, supra

18
19 8/ (Continued) holding of the Court below apply whether or
20 not the petitioner had committed a crime at the time of his peti-
21 tion. However, at least the Court of Appeals for the Second
22 Circuit has declined to go this far (in Hammond v. Lenfest, supra)
23 and the question of deferral thus turns on factors such as the
24 timing of combat orders, prosecutorial discretion and the like.
25 Compare also Noyd v. Bond, supra at footnote 1 (p.685) and cf.
26 the Ninth Circuit's opinion below at 4.

24 9/ See e.g., Noyd v. Bond, supra at footnote 1 and cases
25 there cited. Cf., Craycroft v. Farrell, [397 U.S. 335] supra,
26 noting the existence of a "conflict among the circuits" relating
to the need "to seek relief in the Court of Military Appeals."

10/ The latter two decisions from the Northern District of

1 [408 F.2d] at footnote 1. Similarly, on the closely analogous
2 question of exhaustion before Military Records correction boards
3 the Ninth Circuit has, as noted, explicitly required such
4 exhaustion. Craycroft v. Farrell, supra; cf., Krieger v. Terry,
5 413 F.2d 73 (9th Cir. 1969). Directly to the contrary is the
6 Fourth Circuit's decision in United States ex. rel. Brooks v.
7 Clifford, supra, as well as dicta in several other cases. See,
8 e.g., Hammond v. Lenfest, supra and Robert v. Commanding General,
9 314 F.Supp. 998, 1001 (D. Md. 1970).

10 Taken as a whole, what such cases reflect is not simply
11 the difficulty of the problem here presented,^{11/} but the
12 absence of a unifying foundation or rationale to be applied in
13 consideration of such claims. We believe that the test
14 proposed above - distinguishing between exhaustion of direct
15 and "ancillary" remedies - could help supply the needed guidance.
16 Yet, in any event, reconciliation or at least consideration by
17 this Court is manifestly required. See Davis, ADMINISTRATIVE
18 LAW TREATISE, 1970 Supplement at 643-644.^{12/}

19
20 ^{10/} (Continued) California were, of course, disapproved on
21 this point by the Ninth Circuit in this case.

22 ¹¹ In its Opinion below in these proceedings the Ninth
23 Circuit noted forthrightly that "the question [presented] is
not an easy one." Opinion at 2:17.

24 ¹² Speaking to the question of exhaustion of remedies
25 generally, Professor Davis has noted that although the recent
26 decision of this Court in McKart v. United States, supra
(discussed infra in text) was beneficial "more such opinions
are needed to clarify the law of exhaustion." Davis, supra
at 644.

1 Beyond the conflicting holdings and language in prior
2 cases below, the decision of the Court of Appeals would appear,
3 at best, questionable in light of principles recently enunciated
4 by this Court in McKart v. United States, supra. Indeed, McKart
5 was relied upon strongly by the Fourth Circuit in refusing to
6 require exhaustion before the ABCMR in United States ex. rel.
7 Brooks v. Clifford, supra.

8 As Petitioner reads McKart, that case requires the
9 problem of exhaustion in a given case to be considered in relation
10 to "its purposes and ... the particular administrative scheme
11 involved." (See 395 U.S. at 193). More, as there emphasized,
12 where the interplay of exhaustion and the right to judicial
13 review involves a peril to liberty there must be "a governmental
14 interest compelling enough to outweigh the severe burden
15 placed on petitioner". (395 U.S. at 197). On such grounds
16 this Court held in McKart that a selective service registrant,
17 entitled to exemption from military service as a "sole surviving
18 son", was entitled to raise his erroneous reclassification as
19 a defense to prosecution for failure to submit to induction
20 notwithstanding his failure to exhaust all available adminis-
21 trative remedies.

22 Subsequently, in considering the closely analogous
23 problem of exhaustion before the ABCMR in Brooks, the Fourth
24 Circuit found McKart, if not dispositive on its facts, at least
25 highly persuasive. There, the court ruled that past the point
26 where exhaustion of remedies is mandated by an express statute

1 or regulation, exhaustion should be required only to uphold the
2 "integrity" of the administrative (or military) process, to
3 permit creation of a full record or to permit exercise of peculiar
4 expertise (412 F.2d at 1138-1140). So viewed, in accordance
5 with the Fourth Circuit's understanding of McKart, the Correction
6 Board was held not to present a remedy requiring exhaustion before
7 a petitioner could seek a discharge from the military via habeas
8 corpus in the federal courts. Even granting the possibility
9 that the ABCMR could provide relief in some cases the court
10 felt bound to "consider whether this interest [in reducing the
11 judicial case load] outweighed the burdens which may be imposed
12 upon the petitioner by the constant and continuous delays in the
13 final determination of his claim." So viewed, such interest was
14 found insufficient:

15 "If petitioner's claim of conscientious
16 objection is well-founded (and we have
17 decided that it is), petitioner, and others
18 similarly situated, will be required to
19 litigate administratively during a period
20 in which each hour of each day they are
21 required to engage in conduct inimical to
22 their consciences or be subject to
23 court martial, with the added risk that
24 in the ordinary course of the operations
25 of the military, they may be ordered to a
26 duty even more offensive to them."
(412 F.2d at 1141).

22 Given the even more compelling circumstances of this
23 case, petitioner submits that the rationale of McKart and
24 Brooks at the least requires full consideration by this Court,
25 if not summary reversal.
26

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: February 26, 1971.

Respectfully submitted,

GEORGE A. BLACKSTONE
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB

By GEORGE A. BLACKSTONE

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
5
7
8
)
)

SUPREME COURT OF THE)
UNITED STATES)

The undersigned hereby certifies that three copies of the foregoing Petition for a Writ of Certiorari were mailed today to Solicitor General, Department of Justice, Washington, D. C. 20530, as attorneys for the respondents in this cause.

Dated: February 26, 1971.

DOUGLAS M. SCHWAB

1 UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3 JOSEPH PARISI,)

4 Appellant,)

5 v.)

No. 25773

6 MAJOR GENERAL PHILLIP B. DAVIDSON,)
7 et al.,)

8 Appellees.)

9
10 Appeal from the United States District Court for the
11 Northern District of California

12 Before: HAMLEY, ELY, and CARTER, Circuit Judges.

13 ELY, Circuit Judge:

14 This is an interlocutory appeal, under 28 U.S.C.
15 § 1292(b), from an Order of the District Court, staying
16 habeas corpus proceedings brought under 28 U.S.C. § 2241
17 until trial and final determination of court-martial
18 charges then lodged against the appellant.

19 The complex history of the case is set out in
20 detail in the margin.^{1/} Briefly, Parisi is an army private
21 who alleges that his application for discharge as a con-
22 scientious objector was denied by the army without a basis
23 in fact for the denial. His petition was first presented
24 to the District Court in November, 1969, but proceedings
25 were stayed pending his administrative appeal to the Army
26 Board for Correction of Military Records [ABCMR].^{2/} A partial
27 preliminary injunction also issued, prohibiting Parisi's
28 assignment to any duties which required materially greater
29 participation in combat activity or training than was being
30 required of him in his then duties.

31 Before the ABCMR's decision, however, Parisi
32 was ordered to Viet Nam, where he was to perform noncombatant

1 duties similar to those which had been assigned to him and
2 which he had been performing in this country. After un-
3 successful attempts to win a stay of his redeployment order
4 both from our court and from the Circuit Justice, Parisi
5 chose, with all attendant risks, to disobey a military order
6 to enplane for Viet Nam. Charges were then immediately
7 filed against him, under U.C.M.J. art. 90, for failure to
8 obey a lawful order.

9 Prior to the date set for court-martial, the
10 ABCMR notified Parisi that it had ruled against his appeal.
11 The District Court promptly ordered the Government to show
12 cause why a writ should not then issue. In its return, the
13 Government requested the stay Order in question, on the
14 grounds that to permit concurrent federal court proceedings
15 would constitute an unwarranted interference with the
16 military court system.

17 The question is not an easy one, but we have
18 concluded that habeas proceedings were properly stayed
19 pending the final conclusion of Parisi's military trial and
20 his appeals therefrom.

21
22 The military, no less an agency of the federal
23 government than the federal court system, has the equal
24 responsibility to act consistently with the Constitution
25 and laws of the United States.^{3/} While civilian courts are
26 available to correct, in a proper case, abuses by military
27 authorities,^{4/} they must be careful to avoid unwarranted
28 interference with internal military matters.

29 "[J]udges are not given the task of running
30 the Army. The responsibility for setting up
31 channels through which such grievances can
32 be considered and fairly settled rests upon
the Congress and upon the President of the
United States and his subordinates. The
military constitutes a specialized community

1 governed by a separate discipline from
2 that of the civilian. Orderly government
3 requires that the judiciary be as scrupulous
4 not to interfere with legitimate Army matters
5 as the Army must be scrupulous not to inter-
6 vene in judicial matters."

7 Orloff v. Willoughby, 345 U.S. 83, 93-94, 97 L. Ed. 842, 73
8 S. Ct. 534 (1953). Thus, there is the general rule that:

9 "[H]abeas corpus petitions from military
10 prisoners should not be entertained by
11 federal civilian courts until all available
12 remedies within the military court system
13 have been invoked in vain."

14 Noyd v. Bond, 395 U.S. 683, 693, 22 L. Ed. 2d 631, 89 S.
15 Ct. 1876 (1969).^{5/}

16 Parisi does not argue the wisdom and correctness
17 of the exhaustion of administrative remedies doctrine as
18 applied to military proceedings. He strenuously contends,
19 however, that the doctrine was improperly applied in the
20 court below.

21 First, Parisi argues that the doctrine applies
22 only to administrative, not judicial remedies. The risk of
23 imprisonment and dishonorable discharge inherent in mili-
24 tary judicial proceedings, he claims, renders it unfair to
25 require one first to assert his claims as defenses at a
26 military trial before being able, successfully, to initiate
27 habeas proceedings in a federal civilian court.

28 In support of this argument, Parisi relies,
29 primarily, upon Crane v. Hedrick, 284 F. Supp. 250* (N.D.
30 Cal. 1968). There, it appears that the district judge ex-
31 pressly fejected Government contentions that a claim of
32 wrongful detention in the military by an inservice con-
scientious objector must first be raised as a defense to
court-martial, noting that

"[i]f [the Government's] contentions were to
prevail, the only way one in petitioner's
position could raise his constitutional claims

1 of wrongful detention would be by first
2 committing a crime and facing the possibil-
3 ity of imprisonment."

4 284 F. Supp. at 253.

5 However, assuming, arguendo, the correctness of
6 Crane, the case is distinguishable. Crane was a sailor who
7 deserted his ship after his application for conscientious
8 objector discharge was administratively denied, but before
9 formal charges were brought against him in military court.
10 We note the reasoning, on similar facts^{6/}, of Judge Kaufman
11 in Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968):

12 "[A]lthough the government maintains that
13 Hammond should present his claim as a
14 defense to a court martial, it fails to
15 explain wherein lies his power to convene
16 the court martial that is supposedly to
17 judge him. And, as Professor Jaffe posits,
18 where '[o]ne must at his risk await such
19 further enforcing procedure as the agency
20 chooses to initiate * * * the exhaustion
21 doctrine is inapplicable; the person has
22 no remedy.' Jaffe, The Exhaustion of Ad-
23 ministrative Remedies, 12 Buff. L. Rev. 327,
24 329 (1963)."

25 398 F.2d at 714.

26 This reasoning is inapposite to Parisi's case, for
27 when the District Court issued the Order here challenged,
28 charges had then already been filed against Parisi by the
29 military authorities, the tribunal that was to judge him
30 had already been convened, and the trial itself was imminent.
31 Parisi was not under the burden of being required to commit
32 a further military "crime" in order to provide himself with
a forum. He had already done the act alleged to be unlaw-
ful. Thus, we cannot see that either Crane or Hammond
supports Parisi's argument.^{7/}

33 In Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal.
34 1968), an inservice conscientious objector was granted
35 habeas relief during the pendency of his Article 90 court-
36 martial for failure to obey orders which were given after

1 administrative denial of his application for conscientious
2 objector discharge. But Gann relied solely on Crane and
3 Hammond, supra, and we think that such reliance was misplaced.^{8/}

4 Here, the District Court relied upon In re Kelly,
5 401 F.2d 211 (5th Cir. 1968), wherein the Fifth Circuit up-
6 held a stay order on facts very similar to those before us.^{9/}
7 Parisi's attempts to distinguish Kelly, arguing that there,
8 habeas was invoked after formal court-martial charges were
9 lodged, whereas he sought habeas before he committed the
10 disobedience leading to the military charges against him.^{10/}
11 However, Parisi's November, 1969 petition was prematurely
12 filed under our rule in Craycroft v. Farrell, 408 F.2d 587
13 (9th Cir. 1968), vacated and remanded, 397 U.S. 335 (1970).
14 When the ABCMR ruled in March, 1970, satisfying the adminis-
15 trative exhaustion requirement, Parisi renewed his petition,
16 as was proper, but he, at that time, was already facing court-
17 martial. Thus, he is in the same position as was Kelly in
18 the Fifth Circuit.

19 We are not blind to the possible moral dilemma
20 that Parisi faced. We cannot quarrel with the proposition
21 that disobedience based on the dictates of religious con-
22 science is based on "an obligation, superior to that due
23 the state, of not participating in war in any form." United
24 States v. Seeger, 380 U.S. 163, 172, 13 L. Ed. 2d 733, 85
25 S. Ct. 850 (1965). However, the District Court's injunction
26 was reasonable and afforded ample protection for Parisi's
27 religious scruples. Three judges of our court and our
28 Circuit Justice found that the military order for Parisi's
29 redeployment did not, in the circumstances, violate the
30 District Court's protective order. While Parisi may honestly
31 have disagreed, that disagreement cannot be held to have
32 justified his unilateral determination to defy his military

1 superiors, not to mention the federal judges who had con-
2 sidered and rejected his claim. Were every soldier dissatis-
3 fied with some phase of national policy or military effort
4 allowed to exercise similar discretion, necessary military
5 discipline would collapse. Had Parisi bided his time, it
6 appears, on the record before us now, that he likely would
7 have obtained the relief he sought from the District Court.
8 If the fruits of his impatience are bitter, he has only him-
9 self to blame for their production.

10 A serviceman facing court-martial should not be
11 permitted habeas relief in a federal court during the pendency
12 of his military trial and appeals therefrom, except, perhaps,
13 when it might appear that no military tribunal to which he
14 has recourse is capable of granting an appropriate remedy.

15 In possible anticipation of this qualified conclusion,
16 Parisi argues that the relief he sought in the District Court
17 is in fact elsewhere unavailable. This argument is based on
18 two grounds. First, Parisi asserts that denial of an appli-
19 cation for conscientious objector discharge without a basis
20 in fact is not recognized as a defense to an Article 90
21 court-martial. Second, he argues that even if his claim
22 were a good defense, and established to the satisfaction of
23 the military court, the only remedy he could there expect
24 would be acquittal, not the honorable discharge that might
25 be ordered by a District Court.

26 Were this true, we would hesitate to subject
27 Parisi to the rigors of a fruitless series of appeals; how-
28 ever, we are not convinced that he is correct in his in-
29 terpretation of the existing state of military law.

30 Parisi supports the first of the arguments now
31 under discussion only by his interpretation of certain of
32 the rulings of the military judge at his court-martial.^{11/}

1 It appears to us, however, that if error in the military
2 court is indicated, it is not that the military judge refused
3 to review the merits of Parisi's conscientious objector
4 claim, but that he may have adopted an improperly narrow
5 standard for review thereof. This is surely an appropriate
6 point to present to the military's appellate tribunals,
7 and we are referred to no case from the Court of Military
8 Appeals, the highest military court, indicating that an
9 appropriate constitutional standard will not be required.^{12/}

10 Parisi is also unable to support his contention
11 that the military appellate tribunals are unable to grant
12 him a discharge no matter what his defense is. We are not
13 now prepared to assume that, if it is determined that
14 Parisi's application for discharge was denied without basis
15 in fact, an error of such constitutional magnitude cannot be
16 rectified by a reviewing court within the military system.^{13/}
17 If it should eventually come to pass that the military courts
18 will not apply those constitutional principles which must
19 control their decisions, as well as ours, Parisi may then
20 bring that fact to the attention of the District Court.

21 Affirmed.
22
23
24
25
26
27
28
29
30
31
32

United States Circuit Judges

Footnote 1/

(Reference page 1)

Joseph Parisi was drafted on August 22, 1968. According to the inservice conscientious objector application he filed with the Army on May 22, 1969 (pursuant to Army Regulation (AR) 635-20), Parisi had doubts at the time of his induction about his feelings toward military service. However, his beliefs did not coalesce into conscientious objection until he was well down the road of basic training and initial duty assignment (psychological social work and counseling). His application, which was made prior to issuance of any order for redeployment to a combat station, also stated that his Army experiences to that point led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his Christian beliefs.

The initial interviews mandated by AR 635-20 uniformly terminated in Parisi's favor; the base Chaplain, the base psychiatrist, and the special hearing officer (as well as Parisi's immediate supervisor) all attested to the sincerity and religious nature of Parisi's conscientious objection to military service. According to the record, the Commander of the Army hospital at Parisi's base as well as the Commanding General of his training center also recommended approval of the application, although they did not interview Parisi personally. However, Parisi's immediate commanding officer, Captain Hubman, recommended disapproval, with the notation, "Consider application contrary to paragraph 3b(3) AR 635-20." This paragraph provides that conscientious objector applications will not be favorably considered when:

"(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code."

1 Captain Hubman had not interviewed Parisi nor had he en-
2 gaged in any conversations with Parisi about the latter's
3 religious beliefs and convictions.

4 In November, 1969, the Department of the Army de-
5 nied Parisi's application. That office noted two reasons
6 for its decision: (1) that Parisi's professed beliefs be-
7 came fixed prior to entering the service, and (2) that Parisi
8 was not truly opposed to all war due to his religious
9 beliefs, as demonstrated by his attempts thus far to support
10 it.

11 Parisi then applied to the Army Board for Correc-
12 tion of Military Records (ABCMR) for review of the denial of
13 his discharge. Shortly thereafter, on November 28, 1969,
14 he applied to the United States District Court for the Northern
15 District of California for a writ of habeas corpus. He
16 therein sought discharge from the Army as a conscientious
17 objector.

18 In his habeas petition Parisi claimed that there
19 was no basis in fact for the grounds cited by the Department
20 of the Army in denying his application for a discharge. In
21 addition, Parisi sought a preliminary injunction pending
22 disposition of the proceeding to prevent respondents from:
23 (1) requiring him to obey an order of August 8, 1969, to
24 undergo training preparatory to being transferred to Viet
25 Nam for duty; and (2) transferring him outside the juris-
26 diction of the District Court where the proceeding was
27 commenced.

28 On the day the petition was filed, the District
29 Court, after a hearing, entered an Order enjoining re-
30 spondents from assigning Parisi to any duties which re-
31 quired materially greater participation in combat activity
32 ///

1 or training than was being required of him in his then
2 present duties. This Order was to remain in effect pending
3 decision by the ABCMR on Parisi's application to it for
4 discharge as a conscientious objector.

5 The district court order recites that the court
6 would retain jurisdiction of the case until the ABCMR made
7 its decision. The Order also denied Parisi's application
8 for a preliminary injunction against his transfer out of
9 the Northern District of California. On December 4, 1969,
10 Parisi took an interlocutory appeal (No. 25,133 in this
11 court) from the Order denying his requested preliminary
12 injunction.

13 About this time, Parisi received orders to pro-
14 cess out of his then duty station at Fort Ord, California,
15 and, following training, to report to the Overseas Replace-
16 ment Station at Oakland, California, on December 31, 1969.
17 This was later changed to the United States Army Personnel
18 Center, Fort Lewis, Washington. Parisi then moved in this
19 court for an order staying his deployment outside the
20 Northern District of California pending disposition of his
21 appeal.

22 Three other judges of our court denied the motion
23 on December 10, 1969, "on condition that Respondents pro-
24 duce Appellant in this district if the appeal results in
25 his favor." On December 29, 1969, the Circuit Justice
26 denied a similar application for a stay.

27 Parisi reported, on December 31, 1969, as directed,
28 to the United States Army Personnel Center, Fort Lewis,
29 Washington. At that time he requested an opportunity to
30 file a second application for discharge as a conscientious
31 objector. As required by AR 635-20, he was given seven days
32 to complete his application. However, on January 6, 1970,

1 Parisi advised the authorities at the Personnel Center that
2 he no longer wished to make out an application. Accordingly,
3 he was booked for transportation overseas.

4 Parisi then refused to obey a military order to
5 board a plane for Viet Nam. He was immediately charged with
6 violating Article 90 of the Uniform Code of Military Justice,
7 10 U.S.C. § 890, and was confined to the Post Stockade,
8 pending disposition of the charge against him.

9 On March 2, 1970, while Parisi's court-martial was
10 pending, the ABCMR notified Parisi of its rejection of his
11 application for relief from the Army's denial of his dis-
12 charge request. Four days later the District Court, pursu-
13 ant to Parisi's habeas petition, entered an Order requiring
14 respondents (appellees in this appeal) to show cause why a
15 writ should not be issued. The United States responded by
16 moving in the District Court for a stay of the habeas pro-
17 ceedings pending exhaustion of Parisi's military judicial
18 remedies.

19 At this point Parisi suggested to a panel of judges
20 of our court that the first interlocutory appeal he had
21 taken from his habeas proceeding (No. 25,133 in this court,
22 above) should be dismissed as moot. As noted, the ABCMR
23 had by this time denied him relief, and, since he was in-
24 carcerated at Fort Lewis, there was no remaining need for an
25 injunction to keep him in this country. We entered the
26 requested Order, dismissing the first appeal, on March 17,
27 1970.

28 On March 31, 1970, responding to the Government's
29 motion that it abstain pending completion of Parisi's court-
30 martial proceedings, the District Court entered an Order
31 staying its consideration of Parisi's habeas petition until
32 there was a trial and a final judgment in the military courts.

1 on the court-martial charges.

2 The District Court did not stay the court-martial
3 proceedings pending our consideration of the interlocutory
4 appeal, nor have we done so; consequently, in the interim
5 between the date of the district court order, March 31, 1970,
6 and the date of our acceptance of the appeal, April 24, 1970,
7 Parisi was, on April 8, 1970, court-martialed and convicted
8 of the charge against him. He is presently confined in the
9 United States Army Disciplinary Barracks, Fort Leavenworth,
10 Kansas, serving a sentence of two years at hard labor, with
11 dishonorable discharge. We have been advised that his appeal
12 before the Court of Military Review is now pending.

13 Footnote 2/ (Reference page 1)

14 This is the exhaustion requirement deemed control-
15 ling in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969),
16 vacated and remanded, 397 U.S. 335 (1970). See also
17 Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969); Krieger
18 v. Terry, 413 F.2d 73 (9th Cir. 1969). In Craycroft's
19 appeal before the Supreme Court, the Solicitor General
20 conceded that the administrative remedies which our court
21 had required to be exhausted were either unavailing or had
22 already been exhausted. 397 U.S. at 335.

23 Footnote 3/ (Reference page 2)

24 Craycroft v. Ferrall, 408 F.2d 587, 595 (9th Cir.
25 1969), vacated and remanded, 397 U.S. 335 (1970).

26 Footnote 4/ (Reference page 2)

27 See, e.g., Burns v. Wilson, 346 U.S. 137 (1953);
28 Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Crane v.
29 Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

30 Footnote 5/ (Reference page 3)

31 This rule was established by Gusik v. Schilder,
32 340 U.S. 128 (1950). There, Mr. Justice Douglas, speaking

1 for a unanimous Court, more precisely expressed the rationale
2 for this result:

3 "An analogy is a petition for habeas
4 corpus in the federal court challenging
5 the jurisdiction of a state court. If
6 the state procedure provides a remedy,
7 which though available has not been
8 exhausted, the federal courts will not
9 interfere. . . . The policy underlying
10 that rule is as pertinent to the collateral
11 attack of military judgments as it is to
12 collateral attack of judgments rendered in
13 state courts. If an available procedure
14 has not been employed to rectify the alleged
15 error which the federal court is asked to
16 correct, any interference by the federal
17 court may be wholly needless. The procedure
18 established to police the errors of the
19 tribunal whose judgment is challenged may
20 be adequate for the occasion. If it is,
21 any friction between the federal court and
22 the military or state tribunal is saved.
23 Such a principle of judicial administration is
24 in no sense a suspension of the writ of
25 habeas corpus. It is merely a deferment of
26 resort to the writ until other corrective
27 procedures are shown to be futile."

28 Id. at 131-32. The deference thus deemed appropriate is
29 not demanded by our court's jurisdictional limitations, but
30 by sound considerations of comity. Hammond v. Lenfest,
31 398 F.2d 705 (2d Cir. 1968); In re Kelly, 401 F.2d 211
32 (5th Cir. 1968). So, in an appropriate case, habeas may be
entertained without strict adherence to the exhaustion
requirement. In re Kelly, supra.

33 We have apparently not dealt with the precise
34 exhaustion question raised by this appeal. We declined to
35 consider the issue in Graycroft v. Ferrall, 408 F.2d 587,
36 589 n.1 (9th Cir. 1969), vacated and remanded, 397 U.S. 335
37 (1970). There we

38 ". . . distinguish[ed] our analysis of the
39 exhaustion [of administrative remedies]
40 problem from cases in which, once military
41 administrative remedies have been exhausted,
42 in-service conscientious objectors were al-
43 lowed to seek civil relief before enduring
44 court-martial proceedings and exhausting
45 possible appeals therefrom."

1 589 n.1 (citations omitted).

2 Last term the Supreme Court also declined to re-
3 solve the question whether inservice conscientious objectors
4 who have exhausted administrative remedies must also under-
5 go court-martial proceedings before seeking habeas relief,
6 although it noted that the Circuits have divided on the
7 issue. Noyd v. Bond, 395 U.S. 683, 685 n.1 (1969) (citing
8 cases).

9 Footnote 6/ (Reference page 4)

10 Hammond's application for discharge from the Navy
11 on conscientious objector grounds had been denied before
12 habeas was sought, but no military charges were then
13 pending against him.

14 Footnote 7/ (Reference page 4)

15 The distinction drawn herein was implicitly
16 recognized in Hammond, where the Second Circuit distinguished
17 Gusik on the grounds that Gusik "had already been court-
18 martialled and the Court simply concluded that once that
19 route had been traversed, it was incumbent upon him to ex-
20 haust his appeal" 398 F.2d at 713.

21 Footnote 8/ (Reference page 5)

22 Parisi also relies on Telford v. Seaman, 306
23 F. Supp. 941 (D. Md. 1969) and Cooper v. Barker, 291 F.
24 Supp. 952 (D. Md. 1968). These cases, however, present no
25 new considerations.

26 Footnote 9/ (Reference page 5)

27 Kelly was an inservice conscientious objector court-
28 martialled for wilful disobedience of a superior officer. He
29 brought habeas proceedings during the pendency of his court-
30 martial.

31 Footnote 10/ (Reference page 5)

32 Parisi also asserts that Kelly rested, in part,

1 on the court's conclusion that there was little chance of
2 Kelly's success on the merits of his petition in the District
3 Court.

4 Footnote 11/

(Reference page 6)

5 "Well, I do not read Noyd the way you do as re-
6 quiring that I make a decision and a determination of the basis
7 in fact other than to examine the entire file and the entire
8 record, and in my view determine whether or not the ruling
9 of the Secretary of the Army was arbitrary, capricious, un-
10 reasonable, or an abusive [abuse of?] discretion. Now, that
11 may be saying in different words that I am ruling on the basis
12 in fact. I'm not sure about that. But I do not consider
13 that to be -- and I want the record to so reflect, so that you
14 may have an opportunity to get a definite ruling on it --
15 that I am not ruling solely as a basis of fact. I am ruling
16 that I have examined this document. I have studied it. I
17 find it conforms to AR 635-20. There has been no deprivation
18 of administrative due process and I find from the examination
19 of this record that the ruling of the Secretary of the Army
20 was not arbitrary, capricious, unreasonable, or an abusive
21 [abuse of?] discretion."

22 Footnote 12/

(Reference page 7)

23 In fact, Parisi himself argued at his court-martial
24 that United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195, 2
25 S.S.L.R. 3218 (1969) had settled that review of the basis in
26 fact for administrative denial of a conscientious objector
27 discharge was proper on the issue of the lawfulness of the
28 order alleged to have been disobeyed. United States v. Wilson,
29 2 S.S.L.R. 3548 (U.S.C.M.A. 1969) is not contrary. There,
30 the accused had refused an order to put on his uniform, was
31 court-martialed, and the following instruction was given by
32 the law officer: " . . . Personal scruples or qualms, whether

otherwise, are no defense to the offense of wilful disobedience of the order as alleged"

In upholding this instruction, the Court of Military Appeals remarked:

"As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command. . . . If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience."

2 S.S.L.R. at 3548. However, Noyd seems to make it clear that a defendant's religious convictions are admissible on the issue of the lawfulness of the order allegedly disobeyed. If he were erroneously denied discharge as a conscientious objector, some type of subsequent orders, obviously conflicting with his religious convictions, could be unlawful:

"Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation [as a conscientious objector] had been denied. The validity of the order, therefore, depended on the validity of the Secretary's decision. . . . If the Secretary's decision was illegal, the order it generated was also illegal."

United States v. Noyd, supra at 3221.

"Thus, Wilson merely stands for the proposition that an inservice conscientious objector must obey "lawful" orders, not all orders. See also United States v. Dunn, 38 C.M.R. 917 (1968); United States v. Taylor, 37 C.M.R. 547 (1966).

In this connection, we think the legality of any such subsequent military order could not be determined without consideration of its nature; in scope and magnitude. Obviously, an inservice objector, remaining in the service pending the review of the denial of his claim for discharge,

2 report for muster and drill or an order to maintain himself
3 and his quarters cleanly and neatly. Here, again, we note
4 that the District Court had protected Parisi against exposure
5 to violence. Cf. Kemble v. Commandant, 12th Naval Dist.,
6 ___ F.2d ___ (9th Cir. Feb. 25, 1970).

7 Footnote 13/ (Reference page 7)

8 The All Writs Act, 28 U.S.C. § 1651(a), has been
9 held to permit a military court to issue all "writs necessary
10 or appropriate in aid of. [its] . . . jurisdiction." United
11 States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).
12 The military court's power to issue emergency writs of habeas
13 corpus is well-settled. Noyd v. Bond, 395 U.S. 683, 695 n.7
14 (1969); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399
15 (1967).
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

F. L.
MAR 8 1970
CLERK U.S.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP DAVIDSON,
Commanding General, United States
Army Training Center, Fort Ord,
California; CAPTAIN COUGHLIN,
Commanding Officer, Hospital
Company, United States Army
Training Center, Fort Ord, Calif-
ornia; STANLEY RESOR, Secretary
of the Army,

Respondents.

No. C-69-470-LHB

ORDER STAYING PROCEEDINGS
AND CERTIFYING FOR INTER-
LOCUTORY APPEAL.

This matter came on regularly for hearing on March 26, 1970 pursuant to this court's order to show cause dated March 6, 1970, and pursuant to Respondents' motion for stay of proceedings pending exhaustion of military judicial remedies. Richard L. Goff and Douglas M. Schwab appeared as counsel for petitioner; Steven Kazan, Assistant United States Attorney, appeared as counsel for respondents. After considering the documents and records on file in this action, and the oral arguments of counsel, and good cause appearing therefor,

1. IT IS HEREBY ORDERED that these proceedings are hereby stayed until there has been trial and a final judgment in the military courts on the court martial charges presently

APPENDIX B

- 2 -

70-91

Supreme Court, U.S.

FILED

APR 12 1971

F. ROBERT SEAR, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH PARISI, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,

Solicitor General,

ROBERT C. MARDIAN,

Assistant Attorney General,

ROBERT L. KEUCH,

ROBERT A. CRANDALL,

Attorneys,

Department of Justice,

Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1413

JOSEPH PARISI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The stay order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 1970. The petition for a writ of certiorari was filed on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly stayed this habeas corpus action, to review the Department of the

Army's denial of petitioner's conscientious objector claim, until a final adjudication of the claim in pending court-martial proceedings.

STATEMENT OF FACTS

The facts are essentially as set forth in the margin of the opinion below (Pet. App. A n. 1). Petitioner was inducted into the Army as a draftee on August 22, 1968, and, on May 22, 1969, made application for discharge as a conscientious objector. He asserted that his Army experiences had led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his Christian beliefs. Petitioner's initial interviews with the base Chaplain, the base psychiatrist and the special hearing officer, all pursuant to Army Regulation AR 635-20, uniformly terminated in his favor; however, his immediate commanding officer recommended disapproval of the application on the ground that petitioner's beliefs were "based on essentially political, sociological, or philosophical views, or on a merely personal moral code." AR 635-20, para. 3b(3).

In November 1969, the Department of the Army denied petitioner's application on the grounds that (1) his professed beliefs became fixed prior to entering the service, and (2) he was not truly opposed to all war due to his religious beliefs. Petitioner then applied to the Army Board for Correction of Military Records for review of the denial of his discharge. Shortly thereafter, on November 28, 1969, he filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus

seeking discharge from the Army as a conscientious objector. He also sought a preliminary injunction to prevent his transfer from the jurisdiction of the district court and to prohibit further training preparatory to being transferred to Vietnam.

After a hearing on the request for a preliminary injunction, the district court ordered the Army to refrain from requiring petitioner to participate in activity or training beyond his current noncombatant duties; however, injunctive relief against his transfer outside the district was denied. The court agreed to retain jurisdiction of the case until the Army Board for Correction of Military Records reached its decision.

On December 4, 1969, petitioner appealed that part of the order denying a stay of transfer; at about the same time, he received orders to report, on December 31, 1969, to the Overseas Replacement Station at Oakland, California. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Petitioner then sought a stay of deployment outside the court's jurisdiction pending disposition of his appeal. The stay was denied by a three-judge panel of the court of appeals on December 10, 1969, on condition that the Army produce petitioner if the appeal should result in his favor. On December 29, 1969, a similar application for stay was denied by Mr. Justice Douglas. 396 U.S. 1233.

Petitioner reported to his duty station at Fort Lewis, Washington, on December 31, 1969. At that time he requested an opportunity to file a second application for discharge as a conscientious objector

and, as required under AR 635-20, he was given seven days to complete and file such an application. On January 6, 1970, he informed the Personnel Center that he no longer wished to submit the application. He was then booked for transportation overseas, where he was to perform noncombatant duties similar to those which had been assigned to him and which he had performed in this country. He refused, however, to obey a military order to board the plane for Vietnam. As a result, petitioner was charged with violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890, and was confined to the post stockade pending disposition of the charge against him.

On March 2, 1970, while the court-martial was pending, the Army Board for Correction of Military Records notified petitioner that it had rejected his application for relief from the denial of his conscientious objector claim. The district court, on March 6, 1970, issued an order to the Army to show cause why petitioner's pending writ of habeas corpus should not now issue. On the government's motion, the district court, on March 31, 1970, entered an order staying consideration of petitioner's habeas petition until final judgment in the military courts on the court-martial charges (Pet. App. B).¹ Petitioner took an appeal from that order.

On April 8, 1970, the court-martial convicted petitioner on the charge of refusing to obey a lawful military order; the military judge found that the

¹ At petitioner's request, the district court, on March 17, 1970, dismissed the first interlocutory appeal initiated by petitioner on December 4, 1969.

denial of his conscientious objector claim had not been arbitrary, capricious, unreasonable, or an abuse of discretion; he declined, however, to apply the "basis in fact" standard of review that would be applied on habeas corpus in a district court (Pet. App. A n. 11). Petitioner is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. His appeal from the court-martial conviction is now pending before the Court of Military Review.

On December 3, 1970, the court of appeals (Pet. App. A) affirmed the district court's stay order. It is that affirmance which petitioner now seeks to have this Court review.

ARGUMENT

Petitioner seeks to set aside the stay order in this case on the ground that a serviceman should not be required to exhaust military judicial remedies before obtaining habeas corpus review of a military administrative determination denying him conscientious objector status. In the normal course of events, we would agree. As stated in United States Department of Justice Memo. No. 652, issued October 23, 1969 (Appendix, *infra*, p. 10): "If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Court." But see *Polsky v. Wetherill*, C.A. 10, No. 625-70, decided February 24, 1971.

But this is not such a case. Here, after a denial of his conscientious objector claim by the Adjutant General of the Department of the Army, petitioner elected to initiate an application for review to the Army Board for Correction of Military Records.² While he need not have done so as a condition to judicial review,³ once petitioner chose such a course, the district court could properly defer consideration of his subsequently filed habeas corpus petition pending the outcome of that administrative appeal. Nor does petitioner suggest otherwise (Pet. 11).

Rather, the dispute here centers around the court-martial proceedings, instituted while the administrative appeal was pending, for failure to obey an order to report for noncombatant military service in Vietnam.⁴

² We are advised by the Department of Defense that the Army and Air Force boards will take cognizance of such claims; however, the Navy adheres to the policy of rejecting applications of this nature for want of jurisdiction. See Mem. No. 652, *infra*, p. 11.

³ See Appendix, *infra*, p. 11. *Craycroft v. Ferrell*, 397 U.S. 335. Where a serviceman does not seek further review by the Army Board for Correction of Military Records prior to filing his habeas corpus petition, the Department of Justice now follows the Fourth Circuit's decision in *United States ex rel. Brooks v. Clifford*, 409 F. 2d 700, 706-707, holding that in such circumstances the proper application of the exhaustion of remedies principle does not mandate that he do so.

⁴ This order was separately considered by both courts below and by Mr. Justice Douglas, on petitioner's application for a stay of deployment. In denying the stay, Mr. Justice Douglas noted that, under the district court's protective order, petitioner could not be assigned in Vietnam "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties." He was then assigned to "psychological counselling." *Parisi v. Davidson*, 396 U.S. 1233.

Petitioner, relying primarily on *Hammond v. Lenfest*, 398 F. 2d 705 (C.A. 2),⁵ contends that because his habeas petition was filed prior to commencement of his court-martial, the stay pending a final judgment in the later military judicial proceedings is invalid. But, as noted above (*supra*, p. 6), the petition for habeas corpus was for another reason premature in this case; by the time the Army Board for Correction of Military Records had decided petitioner was not entitled to conscientious objector status, and thus eliminated the prior bar to habeas corpus, "the charges had then already been filed against [petitioner] by the military authorities, the tribunal that was to judge him had already been convened, and the trial itself was imminent" (Pet. App. A, p. 4). Thus, as the court below pointed out (*ibid.*), *Hammond* is inapposite, for here petitioner was not required by the challenged court order " * * * to commit a further military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful."

The instant case is therefore essentially no different from *In re Kelley*, 401 F. 2d 211 (C.A. 5), where the Fifth Circuit, on facts very similar to those presented here, upheld a stay order pending final judgment in court-martial proceedings that had already commenced. Since, here, petitioner's conscientious objector claim was raised as a defense at his court-

⁵ In *Hammond*, no military charges were pending, but the government there argued that Hammond was required by the exhaustion principle to submit to military court-martial as a precondition to judicial review. That position has since been abandoned (see *supra* p. 5).

martial⁶ and is presently subject to review by the military appellate courts, the courts below properly declined to intervene pending a final determination by the military tribunals.⁷ See *Noyd v. Bond*, 395 U.S. 683; *Gusik v. Schilder*, 340 U.S. 128. Nor is there any cause to assume that petitioner cannot obtain a discharge from the military if he is ultimately found to be a conscientious objector. As noted by the court below (Pet. App. A, n. 13) "[t]he military court's power to issue emergency writs of habeas corpus is well settled. *Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967)." The results of the military procedures will, of course, be subject to consideration by the district court, which has retained jurisdiction of the case, at the appropriate time.

⁶ As noted by the court below (Pet. App. A, n. 12), "Parisi himself argued at his court-martial that *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195, 2 S.S.L.R. 3218 (1969), had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of the lawfulness of the order alleged to have been disobeyed" To be sure, the scope of the review to be given the administrative decision in a court-martial such as petitioner's appears not to have been settled by the Court of Military Appeals. See *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112. But there can be no doubt that it is subject to further review in the military appellate proceedings.

⁷ Petitioner's assertion that he is unfairly subject to incarceration while his case "winds slowly through the military judicial system" is somewhat disingenuous. Here, the delay of almost one year between petitioner's conviction and review by the Military Court of Appeals has been occasioned not by the military, but by petitioner himself, who has made a total of seven requests for "enlargement of time."

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

ROBERT L. KEUCH,
ROBERT A. CRANDALL,
Attorneys.

APRIL 1971.

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530, October 23, 1969:

Memo. No. 652

To All United States Attorneys
Re: Habeas Corpus Relief of Servicemen Denied Discharge as Conscientious Objectors

After consultation with the Department of Defense the following policy respecting review of denials of release sought under Department of Defense Directive 1300.6 has been adopted effective immediately:

1. EXHAUSTION OF MILITARY JUDICIAL REMEDIES

If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts. However, if court-martial charges have been preferred military judicial remedies must be exhausted before resort to the civil courts. The Government acquiesces in the decisions in *In re Kelly*, 401 F. 2d 211 (5th Cir. 1968) and *Hammond v. Lenfest*, 398 F. 2d 705 (2d Cir. 1968) and will no longer urge the position taken in *Noyd v. McNamara*, 378 F. 2d 538 (10th Cir. 1967):

2. EXHAUSTION OF MILITARY ADMINISTRATIVE REMEDIES

The decision of the Military will be deemed ripe for judicial review upon the final action of the Adjutant General of the Army, the Chief of the Bureau of Naval Personnel, the Adjutant General of the Air Force or the Commandant of the Coast Guard. Application to the Army and Air Force Boards for the Correction of Military Records will remain an available procedure but will not be insisted upon by the Government as a precondition to judicial review. The Board for the Correction of Naval Records adheres to its policy of rejecting applications for want of jurisdiction.

3. The instructions set forth in the United States Attorneys Bulletin, Vol 17, No. 23, pp. 613-14, to the extent that they are inconsistent with the foregoing, are revoked.

WILL WILSON,
Assistant Attorney General, Criminal Division.

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1971

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON,
Commanding General, United States
Army Training Center, Fort Ord, Cali-
fornia; CAPTAIN COUGHLIN, Command-
ing Officer, Hospital Company, United
States Army Training Center, Fort
Ord, California; STANLEY RESOR, Secre-
tary of the Army.

Respondents.

BRIEF OF PETITIONER

GEORGE A. BLACKSTONE,

RICHARD L. GOFF,

STEPHEN V. BOMSE,

DOUGLAS M. SCHWAB,

44 Montgomery Street,

San Francisco, California 94104,

Attorneys for Petitioner,

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| INTRODUCTION | 1 |
| CITATIONS TO OPINIONS BELOW | 2 |
| JURISDICTION | 3 |
| QUESTION PRESENTED | 3 |
| STATUTES AND REGULATIONS | 4 |
| STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW | 5 |
| SUMMARY OF ARGUMENT | 19 |
| ARGUMENT | 23 |
| CONCLUSION | 67 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|----------------------------------|
| <u>Bratcher v. McNamara,</u> 415 F.2d 760 (9th Cir. 1969) | 25 |
| <u>Brown v. McNamara,</u> 387 F.2d 150 (3rd Cir. 1967) | 5 |
| <u>Cooper v. Barker,</u> 291 F. Supp. 952 (D. Md. 1968) | 5, 25, 45 |
| <u>Crane v. Hedrick,</u> 284 F. Supp. 250 (N.D. Cal. 1968) | 5, 25, 45 |
| <u>Craycroft v. Ferrall,</u> 408 F.2d 587 (9th Cir. 1969), vacated, 25 L. Ed. 2d, 351 (1970) | 23, 24, 25, 26, 31, 47, 61 |
| <u>Damico v. California,</u> 389 U.S. 416 (1967) | 47 |
| <u>Dombrowski v. Pfister,</u> 380 U.S. 479 (1965) | 47 |
| <u>Font v. Seaman,</u> 20 U.S.C.M.A. 387, 43 CMR 227 (1971) | |
| <u>Gann v. Wilson,</u> 289 F. Supp. 191 (N.D. Cal. 1968) | 25, 45 |
| <u>Gusik v. Schilder,</u> 340 U.S. 128 (1950) | 47 |
| <u>Hammond v. Lenfest,</u> 398 F.2d 705 (2nd Cir. 1968) | 5, 25, 44, 46, 51 |
| <u>Houghton v. Sharfer,</u> 392 U.S. 639 (1968) | 47 |

| | <u>Page</u> |
|---|---------------------------------------|
| <u>In Re Kelly</u> , 401 F.2d 211 (5th Cir. 1968) | 25, 45, 46 |
| <u>Jeffers v. Whittley</u> , 309 F.2d 621 (4th Cir. 1962) | 58 |
| <u>Krieger v. Terry</u> , 413 F.2d 73 (9th Cir. 1969) | 25 |
| <u>Lee v. Pearson</u> , 18 U.S.C.M.A. 545, 40 CMR 257 (1969) | 33 |
| <u>Levy v. Resor</u> , 17 U.S.C.M.A. 135, 37 CMR 399 (1967) | 37 |
| <u>McKart v. United States</u> , 395 U.S. 185, 193 (1969) | 19, 29, 30, 50, 56 |
| <u>McNeese v. Board of Education</u> , 373 U.S. 668 (1963) | 47, 58 |
| <u>Noyd v. Bond</u> , 395 U.S. 683 (1969) | 23, 24, 27, 37 38, 42 52, 53 |
| <u>Noyd v. McNamara</u> , 378 F.2d 538 (10th Cir. 1967), aff'g. 267 F. Supp. 701 (D. Colo. 1967) | 24, 25, 44 |
| <u>Orloff v. Willoughby</u> , 345 U.S. 83 (1953) | 27 |
| <u>Polsky v. Wetherill</u> , 438 F.2d 132 (10th Cir. 1971) | 24 |
| <u>Talford v. Seaman</u> , 306 F. Supp. 941 (D. Md. 1969) | 25, 45 |
| <u>United States ex rel Brooks v. Clifford</u> , 412 F.2d 1137 (4th Cir. 1969) | 25, 29, 42 46, 49, 57 |

| | <u>Page</u> |
|---|-------------|
| <u>United States v. Davidson,</u> 30 CMR 921 (1961) | 48 |
| <u>United States v. Noyd, 18</u> U.S.C.M.A. 488, 40 CMR (1969) | 17, 33 |
| <u>United States v. Seeger,</u> 380 U.S. 163, 170-172 (1965) | 59, 62, 66 |
| <u>United States v. Snyder,</u> 18 U.S.C.M.A. 480, 40 CMR 192 (1969) | 36 |
| <u>United States v. Stewart,</u> 20 U.S.C.M.A. 272, 43 CMR 112 (1971) | 17, 34 |
| <u>United States v. Wilson,</u> 2 S.S.L.R. 3548 (U.S.C.M.A. 1969) | 17, 18 |
| <u>Zwickler v. Koota,</u> 389 U.S. 241 (1967) | 47 |

REGULATIONS

| | |
|---|------------------------|
| Army Regulation (A.R.) 635-20 | 4, 7, 8, 10, 61, 66 |
| Department of Defense Directive (D.O.D.O 1300.6 | 2, 4, 8, 59, 66 |

STATUTES

| | |
|--------------------|----|
| 10 U.S. C. §867(e) | 36 |
| 28 U.S.C. §2241(a) | 4 |

STATUTES (continued)

| | <u>Page</u> |
|--|-------------|
| 28 U.S.C. §1254(1) | 3 |
| 28 U.S.C. §1292(b) | 17 |
| All Writs Act, 28 U.S.C. §1651(a) (2) | 36 |

MISCELLANEOUS

| | |
|---|----|
| <u>Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Pro- ceedings, 72 YALE L.J. 574 (1963)</u> | 58 |
| Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supp. 642-644. | 57 |

INTRODUCTION

Petitioner, Joseph Parisi, challenges the decision below that he must exhaust military judicial remedies, including appeals, before seeking review in the federal district court of administrative denial of his application for discharge from the military as a conscientious objector. Petitioner respectfully submits that such decision represents an unprecedented extension of the doctrine of exhaustion of remedies and is not supported by the policies underlying the exhaustion doctrine nor by the traditional reluctance of civilian courts to become involved in military affairs. Equally significant, the effect of this decision is to require Parisi and numerous other in-service conscientious objectors either to comply with orders which violate their

religious scruples or be deprived of access to federal courts to secure relief from infringement of Constitutional rights. Such a result conflicts both with settled principles of exhaustion and with the overriding Congressional and Administrative policy that "has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces . . ."

Department of Defense Directive

1300.6, Par. IV A. For these reasons, petitioner urges this

Court to reverse the decision below and order the case to proceed on the merits in the district court.

CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 435 F.2d 299 (9th Cir. 1970). The

earlier order of the district court staying proceedings has not been reported but is included as a portion of the Appendix herein at pages 52-55.

JURISDICTION

The opinion and order sought to be reviewed was entered on December 3, 1970 in Action No. 25773 in the United States Court of Appeals for the 9th Circuit. A Petition for Writ of Certiorari was filed in this Court on February 27, 1971 and the Petition was granted by Order entered May 3, 1971. Jurisdiction in the United States Supreme Court is asserted pursuant to the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a member of the Armed Forces applies to the federal district court for a writ of habeas

corpus on the ground that his application for discharge as a conscientious objector has been wrongfully denied without basis in fact, and is thereafter charged by military authorities with refusing to obey an order, is it proper for the federal district court to stay the habeas corpus action pending exhaustion of military judicial remedies, including appeals?

STATUTES AND REGULATIONS INVOLVED

The applicable statute is 28 U.S.C. § 2241(a). It provides in pertinent part as follows:

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions"

The applicable regulations are Department of Defense Directive 1300.6 and Army Regulation 635-20 which provide for discharge of a member of the Army on the ground of conscientious objection unless the

application is based solely on conscientious objection which existed but was not claimed prior to induction.

STATEMENT OF FACTS RELEVANT TO THE
ISSUE PRESENTED FOR REVIEW

Petitioner is a candidate for discharge from the military as a conscientious objector. He filed this action in the United States District Court for the Northern District of California seeking a writ of habeas corpus in accordance with the numerous decisions holding that denial of such a discharge "without basis in fact" constitutes deprivation of due process.^{1/} The instant appeal, however, does not

1/ See, e.g., Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968); Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N. D. Cal. 1968).

reach the merits of petitioner's claim -- which are indisputably strong.^{2/} Rather, petitioner here contests an order entered in the district court and affirmed by the

2/ It is one of the particular ironies of this proceeding that, with the exception of the Army reviewing officials in Washington, D. C., no one familiar with petitioner or his claim for discharge has disputed the sincerity of Parisi's discharge request, or the depth of his beliefs. (See infra at 10-11). Indeed, the strength of petitioner's claim on the merits was commented upon in dicta by the court below (App. 71) -- although the effect of that court's holding was to deprive him of the right to prosecute that claim for a substantial period of time.

Court of Appeals, staying the civil action on the ground that petitioner was first required to exhaust military judicial remedies, including appeals. Petitioner contends that such requirement was unwarranted and constituted error.

As respects the question of exhaustion now before the Court, as well as on the merits, these proceedings present an unusually compelling case for relief. Petitioner was drafted on August 22, 1968. Thereafter, on May 22, 1969, he filed an application for discharge as a conscientious objector pursuant to the provisions of Army Regulation (A.R.) 635-20 and

Department of Defense Directive
(D.O.D.) 1300.6.^{3/} At the time
of this filing, petitioner was
stationed at Fort Ord, California
and had received no orders for
overseas duty. In brief,
petitioner's application
described his strong religious
background and training in the
Roman Catholic faith as well as
the practical application of his
beliefs and training as a social
worker in urban ghettos. At the
time he was drafted, petitioner

^{3/} A.R. 635-20 and D.O.D. 1300.6
provide for the discharge of
so-called "in service" conscientious
objectors on standards essentially
equivalent to those applied to
Selective Service registrants
generally with the exception that an
applicant for discharge from the
military may not base his claim solely
upon conscientious objection which
existed but was not claimed prior
to induction.

admittedly had doubts about, but was not conscientiously opposed to, active military service.

However, as a result of experiences in basic training (and from extensive bible study and religious discussion with other soldiers) he became firmly convinced that his continued participation in the military in any form was inconsistent with his religious beliefs.^{4/}

4/ Parisi's application stated in part: "As a Christian, I cannot conscientiously kill or ~~harm another person nor support~~ killing in any way or form. It was intended that Christians practice living as Jesus lived. It is clear that as a Christian and a human being, I believe strongly enough in these ideals of love and peace that a Christian community will ultimately be a reality and the word of God prevail. If this is to become reality, I cannot continue to engage myself in actions which I desire to bring

Petitioner's discharge application was processed in accordance with the requirements of A.R. 635-20 and was submitted to the Army's reviewing officials in Washington, D.C., with the emphatic and unanimous endorsements of the Base chaplain and psychiatrist as well as Parisi's commanding officer and the Army's independent

4/ (continued) an end to. I must serve mankind in a manner by which no man shall suffer or be harmed through my actions. Man was not created with the intention that he would eventually destroy himself. Because man must prevail, it is my duty to object to the violence of war. It is only by acting in this way that war shall end. It is the duty of the Christian to be first to engage himself in opposition to war. Ultimately, this shall stimulate a universal movement for peace in the name of humanity and the gospel."

Hearing Officer who extensively interviewed petitioner.^{5/} However, despite this strong showing, Parisi's application was disapproved by the Army in November, 1969, on the asserted grounds (a) that his beliefs had become "fixed prior to entering the service" and (b) that he was not "truly" opposed to all war by reason of his religious beliefs.

5/ In passing upon Parisi's request for discharge, the Base Chaplain concluded: "There is no question whatever as to the sincerity of the applicant as regards his conscientious objection," and that "his convictions are firm and resolute, nurtured in much genuine soul searching." Similarly, the Base psychiatrist reported that "there is no doubt as to his sincerity in this matter," -- a general conclusion shared by the Army's own Hearing Officer who, after an extended interview, recommended approval of petitioner's discharge request.

Promptly following this denial, Parisi filed a request for review by the Army Board for the Correction of Military Records and, while this request was pending, also filed a petition in the United States District Court seeking a writ of habeas corpus. As noted above, Parisi's habeas petition alleged that he had been denied discharge as a conscientious objector without basis in fact and had thus been deprived of due process under the Fifth Amendment.

On the date of filing (and following hearing) the court ordered the habeas corpus proceedings stayed pending review and action by the ABCMR. However, the court retained jurisdiction of the action and entered a limited protective order restraining the Army from

assigning Parisi to duties involving "materially greater" participation in combat related activities pending further court action. 6/

6/ Although entering the limited restraining order described in text above, the district court declined to enter a requested injunction restraining respondents from transferring petitioner out of the Northern District of California pending disposition of his habeas petition. On December 4, 1969, therefore, Parisi filed an initial appeal in the Court of Appeals for the Ninth Circuit seeking review of the Order denying the injunction against transfer.

At about this same time, Parisi received from the Army the transfer of duty order discussed hereafter in text. He then sought, first from the Court of Appeals, then from Circuit Justice Douglas, an order staying his deployment pending disposition of the pending appeal. These stay applications were denied, respectively, on December 10, 1969 and December 29, 1969.

The earlier appeal in the

Subsequent to the entry of this stay order in the district court, but before any action had been taken by the ABCMR, Parisi received orders which, in essence, provided for his transfer to Viet Nam. Pursuant to these orders, he reported to Fort Lewis, Washington on December 31, 1969, and was there booked for immediate overseas deployment. Parisi, however, firmly believed that such transfer would seriously violate his religious

6/ (continued) Ninth Circuit was subsequently dismissed (March 17, 1970) as moot upon the suggestion of petitioner, following ruling by the ABCMR and entry of an Order to Show Cause by the district court in the habeas corpus action.

beliefs. 7/ He therefore refused to obey the order to board the plane for Viet Nam and was immediately placed in the stockade and charged with violation of Article 90 of the Uniform Code of Military Justice (refusal to obey a lawful order).

7/ As stated in Parisi's affidavit in the district court, for him, the duties in Viet Nam involved far more serious violation of his religious beliefs. This was because the psychological counseling there would involve direct participation in and supporting of combat activities and helping to prepare soldiers for battle. He could also be required at any time to participate directly in combat and the carrying of weapons. The credibility of these beliefs is borne out, we suggest by the following excerpt from an article in Newsweek magazine discussing the My Lai affair:

"When you're in Viet Nam, there is a shift in your thinking away from humanitarian values to simply doing a job," says Dr. Albert Kast, a 30-year old clinical psychologist in San Francisco who spent a year

On March 2, 1970 -- before the military court had been convened to hear the criminal charges against Parisi -- the ABCMR notified petitioner that it had rejected his application for relief. Promptly thereafter, the district court issued an order to show cause in the pending habeas corpus proceedings. In its return, however, the government moved to stay the civil action pending exhaustion of petitioner's military judicial remedies arising out of the then-pending court martial.

7/ (continued)

in Viet Nam. "Our job was getting disturbed people back into combat so they could kill more people. And we did our job very well." (Newsweek, December 8, 1969, p.35).

On March 31, 1970, the district court granted respondent's renewed stay-motion but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

In the interim between that stay order and the order of the Ninth Circuit Court of Appeals accepting petitioner's § 1292(b) appeal (April 24, 1970), Parisi was court martialed and convicted of the charge against him.^{8/} He was sentenced

^{8/} As a defense to his court martial, petitioner asserted, inter alia, that the Army had denied his application for discharge from the Army without basis in fact. This defense was asserted pursuant to the apparent holding by the Court of Military Appeals in United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969) that where conscientious objector discharge is "illegally" refused an order "generated" by such "decision" is "also illegal." But see United States v. Stewart, 20 USMA 272, 43 CMR 112 (1971) and compare U. S. v. Wilson,

to two years hard labor with a dishonorable discharge. His appeal from that conviction before the Court of Military Review is now pending.

On December 3, 1970, the Court of Appeals affirmed the district court's stay order and on May 3, 1971, this Court granted Parisi's petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

8/ (continued) 2 S.S.L.R. 3548
(U.S.C.M.A. 1969).

Passing upon such defense at trial the Military Judge did not strictly purport to pass upon whether there had been a "basis in fact" for the Secretary's administrative denial, but did review Parisi's file to determine whether such action was "arbitrary", "or capricious," constituting an abuse of discretion. See Appendix at 89-91. The judge concluded that no such abuse had been shown. What legal conclusion would have followed had his conclusion been contrary does not appear from the military trial record -- nor is it clear from the decided cases. See the decisions cited above as well and at pages 24-30, infra.

SUMMARY OF ARGUMENT

Petitioner contends that the court below improperly extended the doctrine of exhaustion of remedies in its requirement that he pursue military judicial remedies (including, appeals) from his court martial conviction prior to seeking habeas corpus relief in the Federal District Court. Petitioner submits that an analysis of the exhaustion doctrine focusing in particular upon the considerations deemed important by this Court in McKart v. United States, 395 U.S. 185 (1969), together with an analysis of the particular administrative procedures designed by the military for processing servicemen's applications for discharge as conscientious objectors, demonstrates that those administrative procedures, and no other procedures,

should be exhausted as a precondition to seeking habeas corpus relief in the Federal District Court. Petitioner further contends that principles of comity between Federal and Military Courts cannot justify invoking the pendency of Court Martial proceedings to thwart the wholly independent right of a conscientious objector to obtain Federal Court relief if his discharge application was denied without basis in fact and thus in violation of due process.

Moreover, the decision below is premised on an assumption, not borne out by reported decisions of the military courts, that the relief which petitioner seeks in the Federal District Court -- discharge as a conscientious objector -- is equally available to him through the judicial remedies which he is being forced to pursue in the military.

Petitioner will demonstrate, however, that the availability of such relief is either nonexistent or extremely remote and in any event subject to inordinate delay, and surely cannot constitute an adequate remedy within exhaustion principles.

Petitioner also contends that the decision below has improperly denied him access to federal courts, and has infringed the basic policies underlying exemption for conscientious objection. Petitioner will demonstrate that the effect of the decision below is to make access to the federal courts on habeas corpus conditioned upon the willingness of a conscientious objector discharge applicant to violate his professed beliefs. Where, as here, the soldier seeking relief in the Federal District Court has exhausted the Army administrative procedures specifically designed to deal with applications such as

his, the government has no legitimate interest, petitioner submits, in requiring that additional "remedies" be pursued.

ARGUMENT

THE DOCTRINE OF EXHAUSTION OF REMEDIES DOES NOT PROPERLY REQUIRE AN APPLICANT FOR CONSCIENTIOUS OBJECTOR DISCHARGE FROM THE ARMY TO EXHAUST MILITARY JUDICIAL REMEDIES PRIOR TO SEEKING HABEAS CORPUS RELIEF IN A UNITED STATES DISTRICT COURT, SINCE SUCH JUDICIAL REMEDIES ARE NEITHER DESIGNED NOR INTENDED TO PROVIDE THE TYPE OF RELIEF SOUGHT THROUGH THE ADMINISTRATIVE PROCESS AND REQUIRING SUCH EXHAUSTION WOULD DEPRIVE DISCHARGE APPLICANTS OF ACCESS TO THE FEDERAL COURTS.

This appeal raises important, and unresolved, questions bearing upon the doctrine of exhaustion of remedies and the relation between religious freedom and access to the federal courts, questions which are unresolved by the ^{9/} decisions of lower federal courts.

9/ Although the issue presented here has not previously been determined by this Court, it has been seemingly presented but not reached in Noyd v. Bond, 395 U.S. 683, 685 (n.1) and Craycroft v. Ferrall, 397 U.S. 335 (1970) vacating and remanding 25 L. Ed 2d 351 (1970). Similarly, the question of exhaustion of remedies in the context here presented has been an issue of recurring significance in

In its opinion below, the court of appeals

9/ (continued) the litigated district court and courts of appeal cases. Not surprisingly, the issue has received conflicting treatment in such cases -- a fact which was commented upon by this Court in both Noyd and Craycroft and urged by petitioner as one reason for granting certiorari here. See Petition for Writ of Certiorari at 15-18.

For example, the exhaustion of military judicial remedies prior to maintaining a civil action for habeas corpus was required in an early Tenth Circuit decision, which remains unique in its requirement that a discharge applicant must disobey orders and subject himself to military criminal jurisdiction before being permitted to seek civil habeas relief. Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967) aff'g 267 F. Supp. 701 (D. Colo. 1967). This position was subsequently disavowed by the United States Department of Justice on October 23, 1969 Dep't. of Justice Memo No. 652 [attached as an Appendix to the government's Brief in opposition to the Petition for Certiorari herein], however, the Noyd rule is apparently still urged by United States Attorneys within the Tenth Circuit. See, e.g., Polsky v. Wetherill, 438 F.2d 132 (10th Cir. 1971).

held that where an applicant for discharge

9/ (continued) Subsequent to Noyd, the Second Circuit in Hammond v. Lenfest, supra, refused to require exhaustion through court martial proceedings, as did various district courts, including the Northern District of California in Crane v. Hedrick, supra, and Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968). See also Cooper v. Barker, supra; Telford v. Seaman, 306 F. Supp. 941 (D. Md. 1969). Both Crane and Gann were of course disapproved on this point in the decision of the Court of Appeals herein. The Fifth Circuit in In re Kelly, 401 F.2d 211 (5th Cir. 1968) refused to impose a blanket rule but held that in the case then before the court exhaustion of pending court martial proceedings would be required.

On the closely related question of exhaustion before military correction boards (such as the ABCMR) the courts have similarly divided. The Ninth Circuit has held that such exhaustion is required. Craycroft v. Ferrall, supra; compare also Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969), and Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969). However, the Fourth Circuit has explicitly rejected the Ninth Circuit rule and application to such Boards is not therein required. U. S. ex rel Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969).

The Department of Justice has now disavowed Craycroft and adopted the Fourth Circuit view. Moreover,

from the military as a conscientious

9/ (continued) the appellate decision in Craycroft was vacated by this Court in March, 1970 since the Solicitor General had conceded that the petitioner had either exhausted the remedy in question or it was "nonexistent." (397 U.S. at 335). Nevertheless, the former Ninth Circuit rule apparently retains at least some life in that Circuit. (See the Court of Appeals opinion herein, 435 F.2d at 304). In this connection, it should be parenthetically noted that the Solicitor General's position in its Brief opposing certiorari in the instant proceeding (at page 6) -- that petitioner "voluntarily" elected to proceed before the ABCMR -- is directly contrary to the position which was taken by the local U. S. Attorney in proceedings before the District Court, and also contrary to the Court of Appeals' own statement that Parisi in petitioning to the ABCMR was "satisfying the administrative exhaustion requirement" of Craycroft. Parisi v. Davidson, 435 F.2d at 304. In fact, as far as petitioner is aware, at least in the Northern District of California, the government still urges the courts to follow the Ninth Circuit decision in Craycroft in cases involving Army discharge claimants.

objector is (or becomes) subject to military court martial proceedings, a district court should stay the civil action pending not only military trial but appellate and post-conviction proceedings. Appendix at 63-64. The court's holding was purportedly based upon accepted notions requiring exhaustion of remedies prior to seeking judicial relief and the traditional reluctance of civilian courts to become unduly or precipitiously involved in military affairs. Orloff v. Willoughby, 345 U.S. 83 (1953); Noyd v. Bond, 395 U.S. 683 (1969). As pointed out by the Court^o of Appeals, however, 435 F.2d at 303, petitioner does not dispute "the wisdom [or the] correctness" of either of these principles. Rather, petitioner there maintained and now urges that, properly understood, such principles were not correctly

applied in the lower court and that the decision below extends the doctrine of exhaustion in an extraordinary and unprecedented manner.

What is more, the unavoidable effect of such decision is substantially to close the doors of the federal courts to in-service conscientious objectors who have been wrongfully denied discharge by the military.

A. The Court Below Improperly
Applied the Doctrine of
Exhaustion of Remedies
In This Case

As noted, petitioner does not dispute the important principle requiring exhaustion of remedies. He respectfully submits, however, that the court below fundamentally erred in failing to distinguish between exhaustion of procedures designed to provide the remedy sought (or which would be sought)

in habeas corpus proceedings -- here discharge as a conscientious objector -- and exhaustion of procedures (here court martial) not so designed, and in which such remedy is either unavailable or merely ancillary.

Such a distinction, we submit, is not only fundamental to the doctrine of exhaustion but is readily applied on the facts now at bar.

As recently noted by this Court in McKart v. United States, 395 U.S. 185, 193 (1969), the doctrine of exhaustion cannot be assessed in a given case without "an understanding of its purposes and of the particular administrative scheme involved." See also, e.g., U.S. ex rel Brooks v. Clifford, 412 F.2d 1137, 1138 (4th Cir. 1969). Moreover, as spelled out by McKart and cases following, the exhaustion

30

requirement reflects concern for preservation of "the integrity and autonomy" of the reviewing agency or procedure. This principle in turn encompasses the interests in allowing creation of a full administrative record and the exercise of expertise by the administrative reviewing authority, particularly in matters calling for exercise of administrative discretion, in permitting administrative bodies, where possible, to correct their own errors and in avoiding unnecessary judicial decisions where successful prosecution of administrative remedies will supply the relief sought and thereby moot the controversy. See, e.g., McKart v. United States, supra, 345 U.S. at 194-95.

Viewed against this legal backdrop, the distinction urged by petitioner here is, we suggest, clear. In asserting his right to discharge

from the military as a conscientious objector, petitioner was required to, and did, follow the explicit requirements of Army Regulation 635-20. This included, as more fully described above, the filing of a detailed application form, the securing of various endorsements thereon (including an opinion from a military Hearing Officer knowledgeable in conscientious objector matters) and the submission of such application to the military authorities for review and determination.^{10/} Although petitioner now contests the correctness of the Army's decision on the merits of such application (indeed, the assertion that its decision was without basis

^{10/} Indeed petitioner even took the further step of seeking review by the ABCMR -- an administrative process still required in the Ninth Circuit under Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969) -- despite the Solicitor General's disavowal of the necessity of such further exhaustion.

in fact forms the predicate for the instant habeas corpus action out of which this petition arises), Parisi in no way disputes the propriety of the administrative application procedure.

Far different, however, is a claimed requirement of exhausting military judicial remedies through court martial and military appellate procedures. The function of a court martial is to consider charges of criminal violations of military law, and either to convict and sentence the defendant or to acquit him. Court martials are not convened to pass upon denial of conscientious objector applications, or to grant discharge to those whose applications have been wrongfully denied.

Nevertheless, the government has asserted and the courts below assumed that the court martial process provides an "available" remedy to the conscientious objector applicant solely because a serviceman may perhaps claim in defense to a charge of refusal to obey orders (as Parisi did here) that the order given was unlawful because of wrongful denial of the discharge application. But to suggest that this constitutes an "adequate" military remedy is untenable. In the first place, although the theoretical availability of such a defense was recognized in U.S. v. Noyd, 18 U.S.C.M.A. 483, 40 CMR 195 (1969), no reported military decision (including Noyd itself) has yet accepted such a defense, and subsequent decisions have questioned whether it could exist under any circumstances. See Lee v. Pearson, 18 U.S.C.M.A. 545, 40 CMR 257

(1969); U.S. v. Stewart, 20 U.S.C.M.A.

272, 43 CMR 112 (1971). ^{11/} Moreover,

even if the defense is available; it is entirely possible that the petitioner, either at the trial or at the appellate level could be acquitted not on that basis but on some other ground or defense. The effectiveness of

such a defense is further diluted by the fact that successful appeals might not result in an acquittal but simply in a remand for a new trial. ^{12/} Finally, and

11/ As noted supra, in Parisi's court martial, the government urged and the military judge held, that the administrative denial should not be reviewed even on a limited "basis in fact" test applied by federal district courts; he went no further than to make a determination that the denial was not "arbitrary, capricious, or an abuse of discretion."

12/ In Parisi's military appeal for example, there are a number of assignments of error that are unrelated to the conscientious objection claim; thus the conviction might well be reversed and the case retried without obtaining a ruling on the conscientious objection claim.

of most significance, even successful assertion of the conscientious objection defense normally would entitle the defendant only to acquittal -- not the discharge being sought in the habeas corpus proceedings.

Notwithstanding these obstacles, the government has further asserted and the Court below implied that military relief might be available if petitioner would pursue yet a further post conviction remedy: a petition to the Court of Military Appeals for writ of habeas corpus discharging him from the Army. Such a "remedy" -- which would expand the required exhaustion even beyond the original scope of the

district court's order -- is assertedly based on the power of the Military Court under the All Writs Act, 20 U.S.C. § 1651(a)(2), to issue "all writs necessary or appropriate in aid of its jurisdiction." But the "jurisdiction" of the Court of Military Appeals does not extend to considering or granting servicemen's claims for discharge from the military as conscientious objectors. Rather, that "jurisdiction" is limited by the Uniform Court of Military Justice to appeals from court martial decisions and ordering that those decisions be affirmed or that the court martial charges be retried or dismissed. 10 U.S. Code § 867(e); U. S. v. Snyder, 18 U.S.C.M.A. 480, 40 CMR 192 (1969). To be sure, it has been held that in connection with court martial cases which are or could come before the Court of Military

Appeals, the All Writs Act permits that court to grant writs of habeas corpus pertaining to the nature of defendant's confinement within the military pending appeal from court martial conviction. See, e.g., Noyd v. Bond, 395 U.S. 683, 695 (1969), Levy v. Resor, 17 U.S.C.M.A., 135, 37 CMR 399 (1967). But not even the Court of Military Appeals itself has ever suggested that such jurisdiction includes the power to issue a writ of habeas corpus granting non-punitive separation from the military as a conscientious objector. ^{13/}

^{13/} The instant case is sharply distinguishable from Noyd v. Bond, supra, which held it proper to require resort to the Court of Military Appeals to seek an emergency writ releasing petitioner from incarceration (but not from the military itself) pending appeal from court martial conviction -- but only after finding that the Court of Military Appeals in Levy v. Resor, supra, had directly "held that it would, in appropriate cases, grant the relief

Moreover, apart from the question of available relief, the Court of Military Appeals has expressly held that it will not review the question of the lawfulness of the order which a serviceman has been charged with disobeying -- including "constitutional" objections thereto -- in any kind of "emergency writ" proceeding,

13/ (continued). petitioner now demands from us." 395 U.S. at 695. On the other hand, the government's assertion that Parisi should have been required to seek military habeas corpus discharging him from the Army is directly analogous to another claim which the Supreme Court in Noye rejected -- i.e., a suggestion that petitioner there "should have requested the Air Force Board of Review to release him pending exhaustion of his rights of appeal." As to this claim, the court stated in language apposite here:

"The Government, however, cites no decision of a Board of Review which asserts the power to grant emergency interlocutory relief prior to the Board's consideration of the case on the merits; nor are we referred to any statute which unequivocally grants this authority. In the absence of any attempt of the Board of

but will only do so "in the normal course of appellate review" -- i.e., after both trial by court martial and intermediate appellate proceedings have been exhausted. Font v. Seaman, 20 U.S.C.M.A. 387, 43 CMR 227 (1971). Thus, even were such a remedy theoretically available, its pursuit would require such a lengthy process as to be incompatible with the settled rule that a person need not exhaust remedies which would involve unreasonable 13(a)/ delay.

Indeed, the Court of Appeals in this case did not directly find or hold that the Court of Military Appeals did have the power to grant

13/ (continued)

Review to assert such a power we do not believe that petitioner may be properly required to exhaust a remedy which may not exist."

(395 U.S. at 698, n.11, emphasis added)

13(a)/ See authorities cited at n.17, infra

such a discharge. Rather, it merely stated "we are not now prepared to assume that, if it is determined that Parisi's application for discharge was denied without basis in fact, an error of such constitutional magnitude cannot be rectified by a reviewing court within the military system." (App. at 73-74) We submit that the court below seriously erred in adopting such an approach. Surely the party who seeks to impose an exhaustion remedy to prevent or suspend access to the federal court to test deprivation of constitutional rights should have the burden of demonstrating that the remedy it would require be exhausted is promptly and effectively available. Yet the Court of Appeals has lifted this burden and instead imposed on petitioner a burden of conclusively

d).
a.

disproving the availability of a remedy which is purely speculative.

Thus, the relief potentially available from the military judicial system is obviously inadequate to secure the relief sought by petitioner in the civil proceedings and to which he is unquestionably entitled if his discharge application was denied without basis in fact. Moreover, and in any event, the military judicial remedies have no relation whatever to the administrative processing of claims for conscientious objector discharge, which petitioner fully pursued and which formed the basis of his habeas corpus action now stayed by the court below. Indeed, requiring the exhaustion of such military judicial remedies would serve none of the basic purposes of administrative exhaustion noted above. Army courts martial and

appellate review bodies neither possess particular expertise respecting conscientious objector claims nor are they prepared to assist in the preparation of a more complete record for judicial review. Compare, e.g., Noyd v. Bond, supra, at 686, note 8 and U.S. ex rel Brooks v. Clifford, supra, at 1140. Moreover, even assuming courts martial will consider defenses based on claims of conscientious objection, such consideration is not a likely source for "correction" of prior administrative error, nor does it involve the exercise of discretion. At the very most, a Military Court would scrutinize such a previous administrative decision only with reference to the limited "basis in fact" test exercised by the civilian courts. This does not involve plenary review, nor administrative discretion or

expertise, but solely a question of law.

The decision below thus represents an unwarranted extension as well as an improper application of the traditional principles governing exhaustion of remedies.

By contrast, the test which petitioner has here proposed would, we submit, uphold the integrity of the military administrative process while leaving open the doors of the civil courts to persons who have diligently pursued their applications for discharge through the requisite phases of administrative processing within the service. ^{14/}

^{14/} The decided cases which have considered the question of "court martial exhaustion" to date, including the decision below, have apparently considered the "time" element of some significance to the question of whether exhaustion is, or should be, required. Three

B. The Court Below Should Not Have Deferred Review of Final Military Administrative Action to the Military Courts.

For similar reasons, deference to military jurisdiction is not properly

14/ (continued) apparent categories have evolved. The first situation is presented where no military criminal proceedings are pending at either the time when the habeas petition is filed or when the stay is sought. Thus, the exhaustion claim is presented, as it were, as an absolute -- i.e., that the petitioner is required to commit a crime and face court martial charges before being permitted civilian review. This is the generally discredited view of Noyd v. McNamara, supra. Compare Hammond v. Lenfest, supra.

In the second instance, no charges are pending at the time the petition for habeas corpus is filed, but, during its pendency, a military crime is allegedly committed and a court martial is convened. This is essentially the situation before the courts here -- although the Ninth Circuit apparently construed the facts somewhat differently. See App, at 69-70.

Finally, there is the situation presented where the alleged crime is committed and charges are preferred prior to habeas corpus relief being sought.

required in the instant proceedings since

14/ (continued) This is seemingly the most common situation confronted by the courts, being presented in In Re Kelly, Cooper v. Barker, Talford v. Seaman, Gann v. Wilson and Crane v. Hedrick, all supra. As noted in footnote 9, these cases have resulted in conflicting holdings.

Petitioner submits that the relative time when military charges are levelled should not materially affect the exhaustion issue presented here. The considerations we advance in text would appear to apply with virtually equal strength whether the court martial charges are brought before habeas corpus is sought or while such action is pending. In both cases, as we discuss more fully in text hereafter, the pendency of military criminal proceedings is largely unrelated or random in relation to the serviceman's administrative right to discharge -- and to review of its denial for constitutional defect. But if any relevance is attached to the time distinction, Parisi's situation presents a stronger case for foregoing exhaustion than, e.g., Cooper or Kelly.

the considerations generally supporting such deference are heavily outweighed by the burdens that it would place upon discharge applicants such as petitioner. See, e.g., Hammond v. Lenfest, supra, at 714; U.S. ex rel Brooks v. Clifford, supra, at 1141. Like the requirement of exhaustion generally (as above discussed), deferral by federal courts to the military does not betoken a lack of subject matter jurisdiction in the civil courts but rather, their reluctance to become unduly involved in military affairs. Indeed, even those cases which have required exhaustion in related contexts have based their holdings not on any lack of jurisdiction to proceed but upon the ground that the proper interplay between civilian and military laws requires such deference

or abstention. ^{15/} Compare, e.g.,

In Re Kelly, supra; Craycroft v.

Ferrall, supra, and see the opinion

below at footnote 5, and accompanying text (Appendix 64-65, 85-88).

^{15/} To the extent that the reluctance of the federal courts in such proceedings is based upon or is analogous to the doctrine of voluntary "abstention" consideration should be given to decisions such as Zwickler v. Koota, 389 U.S. 241 (1967), holding such principle applicable "only in narrowly limited 'special circumstances'" and unquestionably not in cases, as here, where the issue presented is one of compliance with constitutional due process standards by the military. Of similar import are cases, generally instituted under 28 U.S.C. § 1983, which have refused to require technical exhaustion in light of the important constitutional rights or liberties in issue. Compare, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); Houghton v. Sharfer, 392 U.S. 639 (1968). See also Dombrowski v. Pfister, 380 U.S. 479 (1965).

While petitioner again does not dispute the general principle of limited deference to military procedures or forums, ^{16/} he would strenuously dispute the application of that principle in the case now at bar. Where, as here, fundamental claims of religious liberty and personal freedom are in issue, the federal judiciary should not

^{16/} The concept, sometimes referred to as comity, under which one judicial system defers to another, is recognized by the Military Courts to require, under appropriate circumstances, that military courts defer to civilian courts. In U.S. v. Davidson, 30 CMR 921 (1961), involving a soldier who had been charged by military and civilian authorities with having committed a crime, the military court held that it must defer to the civilian court where the civilian court's jurisdiction first attached.

voluntarily stay its hand pending the remote possibility that a military court might at some point grant petitioner the relief sought (i.e., discharge from the Army as a conscientious objector) as an incident to reviewing his military criminal conviction. Such a requirement would unduly burden the basic right of access to the federal courts to test denial of constitutionally guaranteed due process. In such circumstances as the Fourt Circuit aptly pointed out in rejecting an analogous exhaustion claim in U. S. ex rel Brooks v. Clifford, supra, it is not enough to find that relief might be theoretically available in some cases and that a modest saving in judicial time might be then effected. Rather, where such personal liberties are at stake, a court must "consider

whether this interest [in reducing the judicial caseload] outweigh[s] the burdens which may be imposed upon the petitioner by the constant and continuous delays in the final determination of his claim."

Compare McKart v. U. S., supra, at 197.

Thus viewed, the court in Brooks held that proceedings before the ABCMR were not prerequisite to consideration of a conscientious objector's petition for habeas corpus:

"If petitioner's claim of conscientious objection is well-founded (and we have decided that it is), petitioner, and others similarly situated, will be required to litigate administratively during a period in which each hour of each day they are required to engage in conduct inimical to their consciences or be subject to court martial, with the added risk that in the ordinary course of the operations of the military, they may be ordered to a duty even more offensive to them."
(412 F.2d at 1141)

Compare also, e.g., Hammond v. Lenfest, supra, at 714.

As we have discussed above, to the extent that deference to military procedures is properly required in order to give the military ample opportunity to govern itself or to correct its own errors, that opportunity was provided when petitioner complied with the application and review procedures of A.R. 635-20 -- and certainly when he thereafter made application for review, by the ABCMR. When petitioner's applications were reviewed, and denied, by the military, the issue of his rights to discharge became ripe for review on habeas corpus since the administrative record was then complete, those persons within the military having supposed expertise

had been provided the opportunity to exercise it and there had been opportunity for correction of error in the ABCMR. At that point there was no basis for requiring petitioner to pursue the essentially unrelated remedies of the military judicial processes prior to obtaining civilian review of his administrative discharge claim.

The decisions of this Court in Gusik v. Schilder, 340 U.S. 128 (1950) and Noyd v. Bond, supra, do not affect the result urged here. In each of those cases -- as well as in the so-called "state habeas" cases from which these decisions derive -- the petitioners requested the civilian courts to intervene directly in pending military criminal proceedings and sought relief in the nature of "collateral attack" of the

precise type which the military forum was intended and able to provide.

Thus, in both Gusik and Noyd, the habeas petitions filed related solely to the military prosecutions then in progress and did not give rise to, or involve, any independent claim for relief.

By contrast, the habeas corpus petition filed by Parisi relates solely to the denial of his administrative request for discharge as a conscientious objector. He has not and does not ask the federal courts for appellate review of or collateral attack upon the military prosecution against him, or for supervision of the administration of criminal justice in the military. Instead, having fully pursued the administrative process, he invokes the settled jurisdiction of the district court to decide whether the

military denial of his application for discharge as a conscientious objector was without basis in fact and hence a deprivation of his constitutional right of due process. If it was, he is entitled to a determination by the district court of his right to be discharged as a conscientious objector, and to the enforcement of that right through appropriate remedy in light of the facts of the case. This jurisdiction of the federal courts and right of the petitioner is entirely independent of the military criminal proceedings against him. The exercise of that jurisdiction to protect petitioner's constitutional rights surely offends no proper concept of the relationship between the judiciary and the military.

C. The Decision Below Improperly
Denied Petitioner Access to
The Federal Courts and Infringes
The Basic Policies Underlying
Exemption for Conscientious
Objection

Requiring exhaustion of military judicial remedies on principles of comity or abstention is particularly inappropriate in light of the effect which such deferral would have upon the availability of the federal courts and the habeas corpus remedy itself to test unlawful denial of conscientious objector discharge. Petitioner respectfully submits that the exhaustion requirement imposed below would have the undeniable effect not simply of delaying such relief, but of totally depriving servicemen whose discharge claims have been wrongfully denied of access to the federal courts during virtually the full period of their military confinement.

Even granting the possibility that

military courts may have the power to grant discharge incident to review of criminal charges, the modest saving in judicial time thus effected cannot realistically be deemed sufficient to balance the detriment created by such requirement. Indeed, as this Court pointed out in McKart, supra, where a peril to liberty is in issue there must be "a governmental issue compelling enough to outweigh the severe burden placed upon petitioner" before exhaustion will be compelled (395 U.S. at 197). Although McKart approached the exhaustion question in the context of an asserted defense to criminal prosecution for failure to submit to induction, we think it clear that the Court spoke more broadly in its analysis of the exhaustion requirement -- a view which is shared by subsequent cases (e.g.,

U. S. ex rel Brooks v. Clifford, supra and the leading commentators. Compare Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supplement at 642-644.

The value of civilian review of military action, such as that challenged here, is no greater than the availability of reasonably prompt access to the courts. Thus, the mere fact that habeas corpus relief is theoretically available to petitioner at some future time after his military criminal proceedings have run their lengthy course is of little value to petitioner, or to persons similarly situate, particularly when weighed against the consequences to their personal liberty and conscience.

Compare U. S. ex rel Brooks v. Clifford, supra, at 1141 (quoted supra, at 50) ^{17/}

^{17/} In Brooks, the Court regarded the speed of habeas corpus actions (as compared to the average four-month

In these circumstances, petitioner would respectfully submit that the unconscionable delays which would be worked by requiring pursuit of military judicial remedies would unduly stifle pursuit of legal remedies without compensating benefit and would thus undermine the important purposes of allowing resort to the federal

17/ ABCMR proceedings) as an independent basis for refusing to require exhaustion in that case. Indeed, undue delay has traditionally been a basis for bypassing resort to (or terminating) administrative proceedings. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Jeffers v. Whittley, 309 F.2d 621 (4th Cir. 1962). Cf. Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 YALE L.J. 574 (1963). Given not only the history of this case but the indisputable length of criminal trial and appellate proceedings generally, it is hard to dispute the pertinence of such principle here.

courts to redress violations of fundamental constitutional rights.

Finally, the lower court's decision is irreconcilable with the nature and purposes of the exemption from military service which is accorded to conscientious objectors. The rationale of that exemption is the congressional and administrative recognition that "there is a higher loyalty than loyalty to this country, loyalty to God," that an intense "moral dilemma" exists for "those who believe that they owe an obligation superior to that due the state of not participating in war in any form," and that "liberty of conscience" is so vital "that nothing short of self-preservation of the state should warrant its violation." U.S. v. Seeger, 380 U.S. 163, 170-172 (1965). As stated by D.O.D. 1300.6 "the congress . . . has deemed it more essential to respect

a man's religious beliefs than to force him to serve in the armed forces"

Yet the exhaustion requirement now urged by the government would subvert this policy by imposing on conscientious objectors the very kind of moral dilemma which the exemption for conscientious objection was intended to prevent.

For that requirement would force discharge applicants to face an unconscionable choice between firmly held religious beliefs and the right to have such beliefs tested in civil courts of law on a petition for habeas corpus.

This result is sharply illustrated by Parisi's own case. While Parisi's application for discharge was pending and prior to its denial by the Secretary of the Army, respect for his conscientious scruples was given protection by an Army

regulation providing, in pertinent part, "an individual who applies for discharge based on conscientious objection will be retained in his unit and assigned to duties providing the minimum practicable conflict with his asserted beliefs pending a final decision on his application." ^{18/}

But as soon as Parisi's application had been denied by the Secretary of the Army (notwithstanding its uniform endorsement by all who interviewed Parisi) the Army (1) took the position that under Craycroft v. Ferrall, supra, petitioner must appeal to the ABCMR before seeking relief on habeas corpus, (2) withdrew the protective provisions of its regulations

18/ A.R. 635-20, Par. 6(a).

and (3) issued orders transferring petitioner to duty in Viet Nam and persisted in those orders notwithstanding pending petitions both to the ABCMR and the federal district court -- orders which, at least for Parisi, would compel violation of his religious beliefs.^{19/}

^{19/} It is true that a court (as the district court herein) may have disagreed with a serviceman's claim that such an order has materially increased the conflict with his religious beliefs and thus refused to temporarily restrain such orders. But that does not detract from the sincerity of the individual's own beliefs. As the Supreme Court has reminded us in U. S. v. Seeger, supra, a man's religious beliefs in relation to military service involve "an intensely personal area" in which one individual's beliefs may be "incomprehensible to others," yet the "validity of what he believes cannot be questioned." 380 U.S. at 184-85.

Had Parisi been willing to accept the Army's commands in spite of their violence to his conscientious scruples, he would have been permitted to pursue his petition for habeas corpus. Yet because of the strength of his beliefs he was unwilling to compromise the dictates of his conscience or his beliefs to conform with military orders which surely had the effect (if not the intent) of escalating the relationship between his military duties and combat activities. As a result, he is now indefinitely denied civil relief which would be available to those servicemen who are willing to compromise rather than remain faithful to their beliefs as they see them.

Thus ironically the effect of the lower court's decision in this case is to bar civilian habeas corpus review to conscientious objectors whose beliefs are most strongly and sincerely held. A military denial of an application for discharge as a conscientious objector might be totally without basis in fact and thus a clear violation of constitutional right. Yet under the decision below, military commanders, simply by issuing subsequent orders conflicting with the claimant's religious beliefs, can effectively or seriously impair his right to apply to the federal courts to test the validity of and secure relief from the military

refusal to recognize his claim of
20/
 conscience.

Such a result strikes at the heart of the exemption from military service based on religious belief. It is, after all, axiomatic that for the true and sincere conscientious objector, orders compelling performance of

20/ This is not to suggest or presume bad faith on the part of the military. It is simply to affirm that the power of military officials, whatever their intentions, to issue orders and initiate court martial proceedings against conscientious objector applicants should not be allowed to thwart such applicants' rights to invoke the jurisdiction of the federal court to test the wrongfulness of denial of discharge applications.

regular military duties -- particularly in a combat zone' -- create intense, indeed incompatible conflict with religious faith. It is the very essence of conscientious objection to resolve that conflict by remaining loyal to the "obligation superior to that due the state." U. S. v. Seeger, supra. ^{21/}

21/ Indeed the regulations providing for discharge of in-service conscientious objectors, D.O.D. 1300.6, Par. VI, D.3., and A.R. 635-20, Par. 4.a(4)(b) implicitly recognize that refusal to obey military orders is an essential part of the conscientious objection which is a ground for discharge. Both regulations cite 38 U.S. Code § 3103's provision that "the discharge of any [member of the armed forces] on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities . . . shall bar all rights of such person under laws administered by the Veterans Administration" (emphasis supplied) and require that the conscientious objector applicant be advised of the provisions of that section.

To hold that a conscientious objector who thus refuses orders because of his religious beliefs thereby forfeits prompt access to the federal courts to test the constitutionality of the rejection of his discharge application is to deny the respect for religious beliefs and liberty of conscience which underly the conscientious objector exemption. Such a result, we submit, is neither required nor justified by the exhaustion principles so tenuously asserted in the case at bar.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this court to reverse the

decision of the Ninth Circuit Court
of Appeals and to remand this action
to the district court for proceedings
on the merits.

Dated at San Francisco, California,
this 14th day of July, 1971.

Respectfully submitted,

GEORGE A. BLACKSTONE
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB

Attorneys for petitioner

No. 70-91

Supreme Court, U.S.

FILED

1971

E. PROCTOR CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH PARISI, PETITIONER

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,

ROBERT C. MARDIAN,
Assistant Attorney General,

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General,

ROBERT L. KEUCH,
ROBERT A. CRANDALL,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

| | Page |
|---|------|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Summary of argument | 7 |
| Argument: | |
| A serviceman should be denied access to the civil courts for extraordinary relief until final disposition of his claims on related issues pending before military tribunals | 11 |
| A. The civil courts and the military | 11 |
| B. Applying the exhaustion requirement in the instant case | 17 |
| C. The military tribunals can afford appropriate relief | 32 |
| D. The factor of delay | 46 |
| Conclusion | 51 |
| Appendix A | 52 |
| Appendix B | 59 |
| Appendix C | 61 |
| Appendix D | 63 |

CITATIONS

Cases:

| | |
|--|------------|
| <i>Anderson v. Laird</i> , 437 F. 2d 912, petition for certiorari pending, No. 70-240, this Term | 16 |
| <i>Anderson v. MacKenzie</i> , 306 F. 2d 248 | 16 |
| <i>Beard v. Stahr</i> , 370 U.S. 41 | 16, 17, 31 |
| <i>Blalock v. United States</i> , 247 F. 2d 615 | 39 |

II

Cases—Continued

| | Page |
|--|----------------------------|
| <i>Bratcher v. McNamara</i> , 415 F. 2d 760 | 18, 19 |
| <i>Brown v. McNamara</i> , 387 F. 2d 150, certiorari denied, 390 U.S. 1005 | 13 |
| <i>Burns v. Wilson</i> , 346 U.S. 187 | 12, 13, 14, 17, 27 |
| <i>Byrne v. Resor</i> , 412 F. 2d 774 | |
| <i>Coombs v. Commanding General</i> , W.D. La., Civ. No. 16,573, decided August 21, 1971 | 26 |
| <i>Cooper v. Barker</i> , 291 F. Supp. 952 | 25 |
| <i>Crane v. Hedrick</i> , 284 F. Supp. 250 | 22, 23 |
| <i>Craycroft v. Ferrall</i> , 408 F. 2d 587, vacated and remanded, 397 U.S. 335 | 18, 19, 24, 31 |
| <i>Dale v. United States</i> , 19 U.S.C.M.A. 254, 41 C.M.R. 254 | 43 |
| <i>Davies v. Clifford</i> , 393 F. 2d 496 | |
| <i>Dombrowski v. Pfister</i> , 380 U.S. 479 | 30 |
| <i>Doyle v. Koelbl</i> , 434 F. 2d 1014, certiorari denied, 402 U.S. 908 | 16, 17 |
| <i>Drifka v. Brainard</i> , 294 F. Supp. 425 | 40 |
| <i>Dynes v. Hoover</i> , 20 How. 65 | 13 |
| <i>Ehlert v. United States</i> , 402 U.S. 99 | 33 |
| <i>Eagles v. Samuels</i> , 329 U.S. 304 | 11, 29 |
| <i>Fay v. Noia</i> , 372 U.S. 391 | 11, 15, 20 |
| <i>Gale v. United States</i> , 17 U.S.C.M.A. 40, 37 C.M.R. 304 | 10, 42, 45 |
| <i>Gann v. Wilson</i> , 289 F. Supp. 191 | 25 |
| <i>Gillette v. United States</i> , 401 U.S. 437 | 48 |
| <i>Goguen v. Clifford</i> , 304 F. Supp. 958 | 35 |
| <i>Gorko v. Commanding Officer</i> , 314 F. 2d 858 | 12 |
| <i>Grimley, In re</i> , 137 U.S. 147 | 14 |
| <i>Gusik v. Schilder</i> , 340 U.S. 128 | 14, 17, 25, 31, 41, 46, 47 |
| <i>Hamilton v. Regents</i> , 293 U.S. 245 | 48 |
| <i>Hammond v. Lenfest</i> , 398 F. 2d 705 | 11, 13, 17, 22, 23, 24, 25 |
| <i>Harmon v. Brucker</i> , 335 U.S. 579 | 16 |
| <i>Horner v. Resor</i> , 19 U.S.C.M.A. 285, 41 C.M.R. 285 | 43 |
| <i>Johnson v. United States</i> , 19 U.S.C.M.A. 407, 42 C.M.R. 9 | 43 |
| <i>Jones v. Cunningham</i> , 371 U.S. 236 | 11 |
| <i>Kauffman v. Secretary of the Air Force</i> , 415 F. 2d 991 | 12 |

III

Cases—Continued

| | Page |
|---|-------------------------------|
| <i>Kelly, In re</i> , 401 F. 2d 211 | 17, 25, 40 |
| <i>Kennedy v. Commandant</i> , 377 F. 2d 339 | 12 |
| <i>King v. Moseley</i> , 430 F. 2d 732 | 12 |
| <i>Krieger v. Terry</i> , 413 F. 2d 73 | 18, 19 |
| <i>Lee v. Peterson</i> , 18 U.S.C.M.A. 545, 40 C.M.R. 257 | 36 |
| <i>Levy v. Resor</i> , 17 U.S.C.M.A. 135, 37 C.M.R. 399 .. | 43 |
| <i>Locks v. Laird</i> , 449 F. 2d 479 | 26, 30, 40 |
| <i>McCurdy v. Zuckert</i> , 359 F. 2d 491, certiorari denied <i>sub nom. McCurdy v. Brown</i> , 385 U.S. 903 .. | 16 |
| <i>McElroy v. Guagliardo</i> , 361 U.S. 281 | 16 |
| <i>McFadden v. Selective Service System</i> , 415 F. 2d 1140 | 41 |
| <i>McGee v. United States</i> , 402 U.S. 479 | 16, 26, 30, 31 |
| <i>McKart v. United States</i> , 395 U.S. 185 | 8, 16, 26, 28, 30, 31, 46 |
| <i>Michaelson v. Herren</i> , 242 F. 2d 693 | 16 |
| <i>Minasian v. Engle</i> , 400 F. 2d 137 | 17 |
| <i>Mueller v. Brown</i> , 18 U.S.C.M.A. 534, 40 C.M.R. 246 | 23, 45 |
| <i>Noyd v. Bond</i> , 395 U.S. 683 | 8, 15, 17, 25, 27, 31, 43, 47 |
| <i>Noyd v. McNamara</i> , 378 F. 2d 538 | 23, 24 |
| <i>O'Callahan v. Parker</i> , 395 U.S. 258 | 9, 12, 16, 29 |
| <i>Oestereich v. Selective Service Board</i> , 393 U.S. 233 .. | 11, 29 |
| <i>Orloff y. Willoughby</i> , 345 U.S. 83 | 7, 12, 13, 17, 27 |
| <i>Parisi v. Davidson</i> , 396 U.S. 1233 | 20 |
| <i>Patterson v. Lamb</i> , 329 U.S. 539 | 13 |
| <i>Polsky v. Wetherhil</i> , No. 1656, October Term 1970, certiorari granted and cause remanded, 403 U.S. 916 | 24 |
| <i>Raderman v. Kaine</i> , 411 F. 2d 1102, certiorari dismissed, 396 U.S. 976 | |
| <i>Reaves v. Ainsworth</i> , 219 U.S. 296 | 12-13 |
| <i>Reid v. Covert</i> , 354 U.S. 1 | 16, 27 |
| <i>Relford v. Commandant</i> , 401 U.S. 355 | 12 |
| <i>Sanford v. United States</i> , 399 F. 2d 693 | 39 |
| <i>Schlanger v. Seamans</i> , 401 U.S. 487 | 11 |
| <i>Smith v. Resor</i> , 406 F. 2d 141 | |
| <i>Sohm v. Fowler</i> , 365 F. 2d 915 | 16, 17 |
| <i>Sommers, In re</i> , 325 U.S. 561 | 48 |

Cases—Continued

Page

| | |
|--|-----------------------|
| <i>Swisher v. United States</i> , 237 F. Supp. 921, affirmed, 354 F. 2d 472 | 12 |
| <i>Talford v. Seaman</i> , 306 F. Supp. 941 | 22, 23 |
| <i>Taylor, In re</i> , 12 U.S.C.M.A. 427, 31 C.M.R. 13 | 42 |
| <i>Thompson v. Wetherill</i> , W.D. Okla., Civ. No. 70-167, decided April 21, 1970 | 41 |
| <i>Toth v. Quarles</i> , 350 U.S. 11 | 16, 27 |
| <i>United States v. Abilene & So. Ry. Co.</i> , 265 U.S. 274 | 20 |
| <i>United States v. Augenblick</i> , 393 U.S. 348 | 12, 43 |
| <i>United States v. Avila</i> , 41 C.M.R. 654 | 36 |
| <i>United States v. Bevilacqua</i> , 18 U.S.C.M.A. 10, 39 C.M.R. 10 | 43, 45 |
| <i>United States v. Dunn</i> , 38 C.M.R. 917 | 33 |
| <i>United States v. Eliason</i> , 16 Pet. 291 | 12 |
| <i>United States v. Frischholz</i> , 16 U.S.C.M.A. 150, 36 C.M.R. 306 | 43 |
| <i>United States v. Goguen</i> , No. 421,998 (A.C.M.R., September 2, 1970), reversed, 20 U.S.C.M.A. 527, 43 C.M.R. 367 | 35, 36, 38, 40 |
| <i>United States v. Jennings</i> , 19 U.S.C.M.A. 88, 41 C.M.R. 88 | 43 |
| <i>United States v. Kent</i> , 40 C.M.R. 404, review denied, 39 C.M.R. 293 | 36 |
| <i>United States v. Larson</i> , 20 U.S.C.M.A. 565, 43 C.M.R. 405 | 38 |
| <i>United States v. MacIntosh</i> , 283 U.S. 605 | 48 |
| <i>United States v. May</i> , 41 C.M.R. 663 | 38, 44 |
| <i>United States v. Noyd</i> , 18 U.S.C.M.A. 483, 40 C.M.R. 195 | 9, 33, 34, 36, 37, 38 |
| <i>United States v. Quirk</i> , 39 C.M.R. 528 | 33 |
| <i>United States v. Rinehart</i> , 8 U.S.C.M.A. 402, 24 C.M.R. 212 | 42 |
| <i>United States v. Sigmon</i> , C.M. 416,356 (decided January 2, 1968) | 33 |
| <i>United States v. Snyder</i> , 18 U.S.C.M.A. 480, 40 C.M.R. 192 | 44 |
| <i>United States v. Stewart</i> , 20 U.S.C.M.A. 272, 43 C.M.R. 112 | 9, 36, 37, 38, 41 |
| <i>United States v. Taylor</i> , 37 C.M.R. 547 | 33 |

Cases—Continued

Page

| | |
|--|--------|
| <i>United States v. Wilson</i> , 19 U.S.C.M.A. 100, 41 C.M.R. 100 | 35 |
| <i>United States ex rel. Berry v. Commanding General</i> , 411 F. 2d 822 | 16 |
| <i>United States ex rel. Brooks v. Clifford</i> , 409 F. 2d 700 | 19 |
| <i>United States ex rel. Mankiewicz v. Ray</i> , 399 F. 2d 900 | 25 |
| <i>Vidal, In re</i> , 179 U.S. 126 | 13 |
| <i>Wales v. Whitney</i> , 114 U.S. 564 | 16-17 |
| <i>Welsh v. United States</i> , 398 U.S. 333 | 48 |
| <i>Wills v. United States</i> , 384 F. 2d 943, certiorari denied, 392 U.S. 825 | 30 |
| <i>Witmer v. United States</i> , 348 U.S. 375 | 48 |
| <i>Wolff v. Selective Service</i> , 372 U.S. 817 | 26, 30 |
| <i>Younger v. Harris</i> , 401 U.S. 37 | 15, 30 |

Constitution, statutes and regulations:

U.S. Constitution:

| | |
|---|-----------------------|
| Art. I, § 8 | 13, 15, 27 |
| Act of May 5, 1950, ch. 169, 64 Stat. 107 | 13 |
| All Writs Act, 28 U.S.C. 1651 (a) | 2, 10, 23, 42, 45, 54 |
| Articles of War, 62 Stat. (1946 ed.) 627 Art. 53 | 13 |
| Art. 53, 62 Stat. 639, 10 U.S.C. (Supp. III) 1525 | 14 |
| Legislative Reorganization Act, amended, 70A Stat. 116, § 207, 10 U.S.C. ((1952 ed.) Supp. IV) 1552, 60 Stat. 837 | 18 |
| Military Justice Act, 10 U.S.C. (Supp. V) 819 | 13 |
| Military Selective Service Act of 1967, 81 Stat. 100 | 32 |
| 50 U.S.C. (1964 ed.) 456(j) | 48 |
| Selective Service Draft Law of 1917, 40 Stat. 76 | 32 |
| Selective Training and Service Act of 1940, 54 Stat. 885 | 32 |
| Uniform Code of Military Justice: | |
| 10 U.S.C. 133 | 32 |
| 10 U.S.C. 832 | 40 |
| Arts. 16-21, 65, 10 U.S.C. 816-821, 865 | 27 |

| Constitution, statutes and regulations—continued | Page |
|--|-------------------------|
| Art. 32, 10 U.S.C. 832 | 40 |
| Art. 64, 10 U.S.C. 864 | 28 |
| Art. 65(a), 10 U.S.C. 865(a) | 28 |
| Art. 66, 10 U.S.C. 866 | 2, 27, 28, 52 |
| 66(a), 10 U.S.C. 866(a) | 52 |
| 66(b), 10 U.S.C. 866(b) | 28, 52 |
| 66(c), 10 U.S.C. 866(c) | 40, 52 |
| Art. 67, 10 U.S.C. 867 | 2, 27, 28, 34, 42, 53 |
| 67(a), 10 U.S.C. 867(a) | 15, 43, 53 |
| 67(b), 10 U.S.C. 867(b) | 13, 43, 53 |
| 67(d), 10 U.S.C. 867(d) | 53 |
| Art. 90, 10 U.S.C. 890 | 5, 21 |
| 10 U.S.C. 1552(a) | 18 |
| Universal Military Training and Service Act of 1948, 61 Stat. 604 | 32 |
| 28 U.S.C. 2241 | 11 |
| Air Force Regulation AFR 35-24 (March 25, 1969) | 33 |
| Army Regulations: | |
| AR 15-185 | 18 |
| AR 135-25 | 48 |
| AR 612-2 (October 1, 1969) | 40 |
| AR 612-35 | 40 |
| AR 635-20 (January 1, 1970) | 2, 3, 5, 33, 35, 48, 56 |
| para. 3b | 3, 48 |
| para. 6(a) | 20 |
| para. 6(d) | 20 |
| AR 635-20 (August 15, 1970) | 56 |
| AR 635-200 | 2, 9, 44, 58 |
| Coast Guard COMDTINST 1900.2 (October 7, 1968) | 33 |
| Department of Defense Directive: | |
| No. 1200.6 (August 21, 1962) | 32 |

VII

Constitution, statutes and regulations—continued

| | Page |
|--|-------------------|
| No. 1300.6 (May 10, 1968) | 2, 33, 47, 48, 54 |
| para. IV (B) (1) | 48, 54 |
| para. IV (B) (2) | 48, 56 |
| para. IV (B) (3) | 48, 55 |
| para. VI (B) (2) | 56 |
| para. VI E | 56 |
| Marine Corps Order MCO 1306.16B (June 18, 1969) | 33 |
| Navy Department BUPERINST 1900-5 (July 18, 1968) | 33 |

Miscellaneous:

| | |
|---|--------|
| Barker, <i>Military Law—A Separate System of Jurisprudence</i> , 36 U. Cin. L. Rev. 223 (1967) | 13 |
| Bishop, <i>Civilian Judges and Military Justice: Collateral Review of Court Martial Convictions</i> , 61 Colum. L. Rev. 40 (1961) | 42 |
| Dept. of Justice, Mem. No. 652 | 19, 61 |
| Warren, <i>The Bill of Rights and the Military</i> , 31 N.Y. U.L. Rev. 181 (1962) | 42 |

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-91

JOSEPH PARISI, PETITIONER

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 61-94)¹ is reported at 435 F. 2d 299. The separate orders of the district court partially denying a preliminary injunction (App. 29-31) and staying further proceedings pending exhaustion of military judicial remedies (App. 52-55) are not reported.

JURISDICTION

The judgment of the court of appeals (App. 95-96) was entered on December 3, 1970. The petition for

¹"App." references are to the joint appendix on file with the Clerk of this Court.

a writ of certiorari was filed on March 1, 1971; it was granted on May 3, 1971 (App. 97; 402 U.S. 942). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly stayed this habeas corpus action, to review the Department of the Army's denial of petitioner's conscientious objector claim, until a final adjudication of the claim in pending court-martial proceedings.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Uniform Code of Military Justice (Arts. 66 and 67, 10 U.S.C. 866 and 867); The All Writs Act (28 U.S.C. 1651(a)); relevant portions of Department of Defense Directive No. 1300.6; and relevant portions of Army Regulations AR 635-20 and 635-200, are set forth in Appendix A, *infra*, at pp. 52-58.

STATEMENT

The essential facts are set forth in the margin of the court of appeals' opinion (App. 75-84, n. 1), and are not here in dispute.

Petitioner was inducted into the Army as a draftee on August 22, 1968. Nine months later he applied for discharge as a conscientious objector, claiming that many of the doubts he had initially had about military service had developed through his Army experiences into a firm conviction that participation in any

form of military activity conflicted irreconcilably with his Christian beliefs. He was interviewed by the base Chaplain, the base psychiatrist, a special hearing officer and his immediate supervisor, as required by Army Regulation AR 635-20; and they all attested to petitioner's sincerity and the religious content of his professed beliefs. In addition, the Commanding General of petitioner's Army training center and the Commander of the Army hospital, although they conducted no personal interview, recommended that petitioner be discharged as a conscientious objector. Petitioner's immediate commanding officer disagreed; he recommended disapproval of the application on the ground that petitioner's beliefs were "based on essentially political, sociological, or philosophical views, or on a merely personal moral code." AR 635-20, para. 3b(3).

In November 1969, the Department of the Army denied petitioner conscientious objector status on grounds that his professed beliefs, although perhaps rooted in religious training, had become fixed prior to induction into the military, and, moreover, failed to demonstrate that he was truly opposed to participation in all war. On November 24, 1969, petitioner applied to the Army Board for Correction of Military Records for administrative review of that determination.

Shortly thereafter, on November 28, 1969, he also commenced the present habeas corpus proceeding in the United States District Court for the Northern District of California. Claiming that the military's

denial of his conscientious objector application without basis in fact. He sought discharge from the Army, and requested a preliminary injunction to prevent his transfer from the jurisdiction of the district court and to prohibit further training preparatory to being transferred to Vietnam. Following a hearing, the district court (App. 29-31) declined at that time to entertain the habeas corpus petition, but it retained jurisdiction of the case pending a decision on petitioner's conscientious objector application by the Army Board for Correction of Military Records. The Army was ordered to refrain from requiring petitioner to participate in activity or training beyond his current noncombatant duties; however, the district court refused to enjoin the Army from transferring petitioner outside the judicial district.

On December 4, 1969, petitioner appealed that part of the order denying a stay of transfer; at about the same time, he received orders to report, on December 31, 1969, to the Overseas Replacement Station at Oakland, California. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Petitioner then sought an order staying his deployment outside the court's jurisdiction pending disposition of his appeal. The stay was denied by a two-judge panel of the Ninth Circuit Court of Appeals on December 10, 1969, on condition that the Army produce petitioner if the appeal should result in his favor (App. 32-33). On December 29, 1969, a similar application for stay was denied by Mr. Justice Douglas (App. 34-37; 396 U.S. 1283).

Petitioner reported to his duty station at Fort Lewis, Washington, on December 31, 1969. At that time, he requested an opportunity to file a second application for discharge as a conscientious objector and, as required under AR 635-20, he was given seven days to complete and file such an application. On January 6, 1970, he informed the Personnel Center that he no longer wished to submit the application. He was then booked for transportation overseas, where he was to perform noncombatant duties similar to those which had been assigned to him and which he had performed in this country. He refused, however, to obey a military order to board the plane for Vietnam. As a result, petitioner was charged with violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890,² and was confined to the post stockade pending disposition of the charge against him.

On March 2, 1970, while the court-martial was pending, the Army Board for Correction of Military Records notified petitioner that it had rejected his application for relief from the denial of his conscien-

² The provision reads in pertinent part that:

Any person subject to this chapter who—

* * *

(2) wilfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

tious objector claim.³ The district court, on March 6, 1970, issued an order to the Army to show cause why petitioner's pending writ of habeas corpus should not now issue. On the government's motion (App. 45-50), the district court, on March 31, 1970, entered an order staying consideration of petitioner's habeas corpus petition until final judgment in the military courts on the court-martial charges (App. 52-55). Petitioner took an appeal from that order.⁴

On April 8, 1970, the court-martial convicted petitioner on the charge of refusing to obey a lawful military order (App. 58-60). The military judge found that the denial of petitioner's conscientious claim had not been arbitrary, capricious, unreasonable, or an abuse of discretion; he declined, however, to apply the "basis in fact" standard of review that would be applied on habeas corpus in a district court (App. 89-91, n. 11). Petitioner is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. His appeal from the court-martial conviction is currently pending before the Court of Military Review.

³ The letter, a copy of which was filed in the district court and has been reproduced in Appendix B, *infra*, pp. 59-60, stated: "Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has been presented to indicate probable material error or injustice."

⁴ At petitioner's request, the district court, on March 17, 1970, dismissed the first interlocutory appeal of that court's denial of a stay of transfer, initiated by petitioner on December 4, 1969.

On December 3, 1970, the court of appeals (App. 61-94) affirmed the district court's stay order. It held that "[a] serviceman facing court-martial should not be permitted habeas relief in a federal court during the pendency of his military trial and appeals therefrom, except, perhaps, when it might appear that no military tribunal to which he has recourse is capable of granting an appropriate remedy" (App. 71). Looking to the military judicial system, the court found that petitioner could, and indeed did, raise the denial of his conscientious objector claim as a defense to his court-martial; if that defense ultimately succeeds, the court suggested, the military courts had ample power under the All Writs Act, 28 U.S.C. 1651(a), to grant petitioner discharge from the Army (App. 72-74, 94, n. 13).

SUMMARY OF ARGUMENT

A. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff v. Willoughby*, 345 U.S. 83, 94. To maintain more rigid standards of order and control within the armed services, Congress, in the exercise of its War Powers, has constructed an autonomous military judicial system. That system is no less responsible to the Constitution and the laws of the United States than its civilian counterpart. Consequently, federal courts have traditionally demonstrated a marked reluctance to intervene precipitately in matters before military tribunals, either to obviate exposure to court-martial or to anticipate the results of a court-martial. They have, instead, in-

voked the doctrine of exhaustion of military remedies in the interest of avoiding "[n]eedless friction" between federal courts and the military system. *Noyd v. Bond*, 395 U.S. 683, 696.

B. The court below properly applied the exhaustion principle in the present case. At the time that petitioner's in-service conscientious objector application had been processed through the Army's administrative channels and ultimately denied by the Army Board for Correction of Military Records, petitioner was already facing court-martial charges for refusal to obey military orders, the military tribunal had been convened and the trial itself was imminent. In these circumstances, requiring him to exhaust available judicial remedies within the Army would not force him " * * * to commit a further military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful" (App. 68).

Just as in a Selective Service context, "the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created" (*McKart v. United States*, 395 U.S. 185, 195), so too in the present context, it must be adapted to the special features of the internal review machinery that has been set up for the military. Responsibility for maintaining order and discipline within the armed services has been vested by Congress in military tribunals; it is not a function of the civil courts. Where, as here, a serviceman chooses, "with all attendant risks, to disobey a military order to enplane for Vietnam" (App. 63), the statutory scheme calls for civil-

ian deference to judicial review by the agency which "has a proper concern in keeping its own house in order" (*O'Callahan v. Parker*, 395 U.S. 258, 282; Harlan, J., dissenting).

C. Nor do we agree with petitioner's assertion that the military tribunals to which he has recourse are incapable of granting an appropriate remedy. The Court of Military Appeals has recently held in *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195, that the administrative denial of conscientious objector status can be challenged in court-martial proceedings for refusal to obey military orders similar to those involved here. That decision, though not without its detractors on the highest military tribunal, remains inviolate today and is followed by the lower military courts. Indeed, petitioner's court-martial entertained his affirmative defense of wrongful denial of discharge by the Secretary, but decided against him on the merits. The argument, however, is still available to him, in the Court of Military Review.

If petitioner should ultimately succeed with his affirmative defense, the Secretary "has no practical alternative except to discharge [him]." *United States v. Stewart*, 20 U.S.C.M.A. 272, 276, 43 C.M.R. 112, 116. In such circumstances, the Judge Advocate General is required by regulation to follow the same procedures that apply when "[t]he discharge or release of an individual from the Army [is] ordered by a U.S. Court or judge thereof." Army Regulation AR 635-200. Moreover, petitioner has an available remedy by way of habeas corpus in the Court of Military Appeals. That tribunal, established by Act of Con-

gress, has power under the All Writs Act to grant extraordinary relief in cases, like the present one, which are subject to its jurisdiction. Where a military court over which the Court of Military Appeals concededly has jurisdiction, or the Court of Military Appeals itself, determines that a serviceman was wrongfully denied discharge as a conscientious objector, there seems every reason to assume that the highest military tribunal, although it has not yet been called upon to do so, will entertain a habeas petition seeking to effectuate that discharge as a legitimate exercise of its "supervisory power over the administration of military justice." *Gale v. United States*, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306.

D. Resort to these military tribunals does not foreclose civilian review; it merely delays consideration by the federal courts until it becomes clear that a final determination of the issues has been made within the military judicial system and a live controversy still remains. If such delay seems unduly harsh to petitioner, that is the necessary consequence of his own action. Had he bided his time for approximately one month, it appears now that he would have obtained the relief he sought from the district court. Having deliberately elected, instead, to defy a military order to report for "psychological counseling" duty in Vietnam, he is in no position to complain of the delay occasioned by permitting the military to prosecute him for such disobedience. Moreover, in the present case, the delay of which petitioner complains is substantially of his own making. Through no less than seven requests for "enlargement of time,"

he has succeeded in bringing the proceedings in the Court of Military Review to a grinding halt for a period of some nine months. In these circumstances, his objection to an application of the exhaustion doctrine on the ground of "unconscionable delay" is not well taken.

ARGUMENT

A SERVICEMAN SHOULD BE DENIED ACCESS TO THE CIVIL COURTS FOR EXTRAORDINARY RELIEF UNTIL FINAL DISPOSITION OF HIS CLAIMS ON RELATED ISSUES PENDING BEFORE MILITARY TRIBUNALS

A. The Civil Courts and the Military

While the law of habeas corpus generally has application in the context of prisoners seeking release from incarceration under criminal convictions (*e.g.*, *Fay v. Noia*, 372 U.S. 391), "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240. Thus, the writ has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully detained in the Armed Forces. See, *e.g.*, *Eagles v. Samuels*, 329 U.S. 804, 312; *Oestereich v. Selective Service Board*, 393 U.S. 233, 235; *Schlanger v. Seamans*, 401 U.S. 487, 489.⁵

⁵ Such persons are considered to be "in custody" as that term is used in 28 U.S.C. 2241, in the sense that they are subject to military orders and control which act as a restraint on their freedom of movement. See *Jones v. Cunningham*, *supra*, 371 U.S. at 240; *Hammond v. Lenfest*, 398 F. 2d 705, 710-712 (C.A. 2).

1. But "the scope of matters open for review" on military habeas corpus applications is "more narrow" than when similar relief is sought by civilians. *Burns v. Wilson*, 346 U.S. 137, 139. "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83, 94. Thus, in *Burns* this Court stated (346 U.S. at 142) that, "when a military [judicial] decision has dealt fully and fairly with an allegation raised in [the habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." See *United States v. Augenblick*, 393 U.S. 348, 351-352.⁶ And in *Orloff*, the Court reaffirmed the general principle (*United States v. Eliason*, 16 Pet. 291, 301-302; *Reaves v. Ainsworth*, 219

⁶ The "fully and fairly" test has generally been interpreted as confining collateral attacks on court-martial judgments to questions of the court-martial's jurisdiction over the person tried and the offense charged (see *O'Callahan v. Parker*, 395 U.S. 258; compare *Relford v. Commandant*, 401 U.S. 355), to alleged denials of substantive due process which, although perhaps raised, were not considered by the military tribunal, and to claims that the convicted serviceman was not afforded all procedural safeguards necessary to a fair trial under military law. See *Gorko v. Commanding Officer*, 314 F. 2d 858, 859 (C.A. 10); *Kennedy v. Commandant*, 377 F. 2d 339 (C.A. 10); *Davies v. Clifford*, 393 F. 2d 496 (C.A. 1); *King v. Moseley*, 430 F. 2d 732 (C.A. 10); *Swisher v. United States*, 237 F. Supp. 921, 924-929 (W.D. Mo.), affirmed, 354 F. 2d 472, 475 (C.A. 8); but see *Kauffman v. Secretary of the Air Force*, 415 F. 2d 991, 996-997 (C.A. D.C.).

U.S. 296, 306; *Patterson v. Lamb*, 329 U.S. 539, 542) that routine administrative determinations by the military, such as duty assignments or officers' commissions, are matters "not within the power" (345 U.S. at 93) of civil courts to review by habeas corpus. See *Brown v. McNamara*, 387 F. 2d 150 (C.A. 3), certiorari denied, 390 U.S. 1005.

This policy of judicial abstention in matters touching on military affairs is rooted in "the doctrine of separation of powers and the responsibility for national defense which the Constitution, Art I, § 8, cl. 1 and Art. II, § 2, places upon the Congress and the President." *Hammond v. Leinfest*, *supra*, 398 F. 2d at 710 (C.A. 2). As observed in *Burns v. Wilson*, *supra*, 346 U.S. at 140, "* * * Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." Within the confines of this statutory frame-

⁷ Military courts are legislative courts created by Congress under U.S. Const., Art. I, § 8; their jurisdiction is independent of Article III judicial power. *In re Vidal*, 179 U.S. 126, 127; *Dynes v. Hoover*, 20 How. 65, 79. See generally Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. Cin. L. Rev. 223 (1967). Following World War II, Congress, in "an effort to reform and modernize the system—from top to bottom" (*Burns v. Wilson*, *supra*, 346 U.S. at 141), extensively revised the Articles of War (62 Stat. 627) and by the Act of May 5, 1950, ch. 169, 64 Stat. 107, created the Uniform Code of Military Justice. Under the new Code, a Court of Military Appeals was created with automatic jurisdiction to review all capital cases and discretionary jurisdiction over non-capital cases. U.C.M.J., Art. 67(b), 10 U.S.C. 867(b). In 1968, the Code was amended by the Military Justice Act, (10 U.S.C. (Supp. V) 819) to improve court-martial and review procedures. See discussion *infra*, pp. 42-44.

work, civil courts have traditionally exercised no power of supervision or review. See *In re Grimley*, 137 U.S. 147, 150. Deference to military jurisprudence is therefore grounded on considerations of autonomy, on judicial recognition that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns v. Wilson*, *supra*, 346 U.S. at 140.

2. This is essentially the same rationale that sustains the exhaustion requirement in military habeas corpus proceedings. Some twenty years ago, this Court, in *Gusik v. Schilder*, 340 U.S. 128, declined to hear a serviceman's challenge to his court-martial conviction of murder on the ground that he had failed first to apply to the Judge Advocate General for a new trial.⁸ Analogizing the situation to a state prisoner petitioning for federal relief, the Court stated (340 U.S. at 131-132):

If the state procedure provides a remedy, which though available has not been exhausted, the fed-

⁸ This remedy was added to the Articles of War, Art. 53, 62 Stat. 639, 10 U.S.C. (1946 ed. Supp. III) 1525, after the district court had granted the petitioner's writ of habeas corpus and ordered him released on bond. The court of appeals reversed (180 F. 2d 662 (C.A. 6)) on the ground that Gusik had failed to exhaust all his military remedies and this Court affirmed, stating that the policy of non-interference prior to exhaustion "is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created * * *." 340 U.S. at 132.

eral courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

To be sure, principles of federalism that discourage precipitous judicial intervention in state proceedings in the interest of comity (see *Fay v. Noia*, 372 U.S. 391, 418; *Younger v. Harris*, 401 U.S. 37, 43-45) do not come into play when military custody is challenged. *Noyd v. Bond*, 395 U.S. 683, 694. Nevertheless, Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const., Art. I, § 8, cl. 14), has chosen to entrust the protection of the rights of servicemen in the first instance to military tribunals, with direct review to a Court of Military Appeals, composed of disinterested civilian judges. U.C.M.J., Art. 67(a)(1), 10 U.S.C. 867(a)(1). These military courts are no less responsible to the Constitution and laws of the United States than their civilian counter-

parts (see *Harmon v. Brucker*, 355 U.S. 579; *Burns v. Wilson*, *supra*, 346 U.S. at 142).

The efficient functioning of our federal legal system thus suggests that civil courts should stay their hand as long as there remain appropriate military channels to provide full and fair consideration of the claims. See *Beard v. Stahr*, 370 U.S. 41; *Doyle v. Koelbl*, 434 F. 2d 1014 (C.A. 5), certiorari denied, 402 U.S. 908; and cf. *United States ex rel. Berry v. Commanding General*, 411 F. 2d 822 (C.A. 5). The military, no less than other federal administrative agencies (see, e.g., *McGee v. United States*, 402 U.S. 479; compare *McKart v. United States*, 395 U.S. 185) should be allowed the opportunity to correct errors—whether they be administrative or judicial—through its own internal review processes. Cf. *Sohm v. Fowler*, 365 F. 2d 915 (C.A.D.C.); *McCurdy v. Zuckert*, 359 F. 2d 491 (C.A. 5), certiorari denied *sub nom.* *McCurdy v. Brown*, 385 U.S. 903; *Anderson v. MacKenzie*, 306 F. 2d 248 (C.A. 9); *Michaelson v. Herren*, 242 F. 2d 693 (C.A. 2). In the absence of any jurisdictional dispute,⁹ it is plainly not the function of the federal judiciary to intervene precipitately in matters pending before military tribunals either to obviate exposure to court-martial or to anticipate the results of a court-martial. See *Wales v. Whitney*,

⁹ The requirement of exhaustion of military remedies has been relaxed by this Court where persons, unlike petitioner in the instant case, are not in the service and contest the underlying jurisdiction of the military to apply military law to them. See *Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, 354 U.S. 1; *McElroy v. Guagliardo*, 361 U.S. 281. And cf. *O'Callahan v. Parker*, *supra*. See also n. 25 *infra*.

114 U.S. 564; *Gusik v. Schilder*, *supra*. Indeed, "the ever-present and urgent need for discipline in the armed services" (*Hammond v. Lenfest*, *supra*, 398 F. 2d at 710) is itself strong reason for civilian deference to this carefully constructed military court system that Congress has created. Cf. *Burns v. Wilson*, *supra*, 346 U.S. at 140.

Federal courts have accordingly declined to entertain habeas corpus applications of servicemen challenging either administrative (see, e.g., *Beard v. Stahr*, 370 U.S. 41; *Minasian v. Engle*, 400 F. 2d 137 (C.A. 9); *Sohm v. Fowler*, *supra*) or judicial (see, e.g., *Gusik v. Schilder*, 340 U.S. 128; *Noyd v. Bond*, 395 U.S. 683; *In re Kelly*, 401 F. 2d 211 (C.A. 5); *Doyle v. Koelbl*, *supra*) determinations by the military while appropriate channels for review remain open within the armed services. Unlike *Burns*, *Orloff*, and their progeny, the focus of these decisions is on the timeliness of judicial review by civil courts, not on its ultimate availability; and the doctrine of exhaustion of military remedies is invoked in the interest of avoiding "[n]eedless friction" between federal courts and the military system." *Noyd v. Bond*, 395 U.S. 683, 696.

B. Applying the Exhaustion Requirement in the Instant Case

The question presented here does not fit comfortably into either the line of authorities requiring exhaustion of military administrative remedies or those decisions calling for exhaustion of military judicial remedies. It falls, instead, somewhere in between

and is in large measure obscured by the procedural context in which it arises.

1. Prior to filing his habeas corpus application in the district court challenging the Army's administrative denial of his conscientious objector claim, petitioner elected to apply for review to the Army Board for Correction of Military Records ("ABCMR").¹⁰ The Army board, unlike its counterpart in the Department of the Navy (see *Craycroft v. Ferrall*, 408 F. 2d 587 (C.A. 9), vacated and remanded, 397 U.S. 335), does take cognizance of in-service conscientious objector claims (cf. *Krieger v. Terry*, 413 F. 2d 73 (C.A. 9); *Bratcher v. McNamara*, 415 F. 2d 760 (C.A. 9)), and, as evidenced by the present case, reviews the administrative record to ascertain if the denial of the claim by the Adjutant General is in any respect erroneous or unjust. See n. 3 *supra*.¹¹

¹⁰ In 1946, Congress enacted legislation (60 Stat. 812, 837) empowering the service secretaries, acting through boards of civilian officers of their respective departments, to alter military records when necessary to prevent injustice. Legislative Reorganization Act § 207, amended, 70A Stat. 116, 10 U.S.C. (1952 ed., Supp. IV), 1552. Pursuant to this legislation, each service established a board for correction of military records, see e.g., Army Regulation AR 15-185; the board's function is, on application by a serviceman, to review the military record and intervene where it finds it necessary to do so "to correct an error or remove an injustice." 10 U.S.C. 1552(a).

¹¹ Because the Board for the Correction of Naval Records does not take cognizance of conscientious objector claims, the government advised this Court in *Craycroft v. Ferrall*, *supra* (see Gov't Mem., No. 718 Misc., October Term 1969, p. 5) that it could not agree with the Ninth Circuit's insistence that *Craycroft* first apply to the Navy correction board "[s]ince the remedy envisaged by the court below would thus clearly

Although the government at one time took the position that recourse to ABCMR was an available administrative remedy within the military that had to be exhausted before servicemen were entitled to resort to the civilian courts for extraordinary relief (see *Krieger v. Terry*, *supra*; *Bratcher v. McNamara*, *supra*; compare *United States ex rel. Brooks v. Clifford*, 409 F. 2d 700, 701 (C.A. 4), it is now the policy of the Department of Justice, as set forth in Mem. No. 652 which appears in Appendix C, *infra*, at pp. 61-62, to treat the action taken by the Adjutant General as the final administrative determination that is "ripe for judicial review" (Appendix C, *infra*, p. 61).

We do not believe, however, that this new policy precludes a district court from electing to defer consideration of the factual basis for denial of an in-service conscientious objector claim where the identical question is already pending before the administrative correction board at the time that the habeas corpus petition is filed. Nor has petitioner raised any objection to such a procedure.¹² It is well recognized

have been futile." This Court vacated the judgment and remanded the cause to the Ninth Circuit (397 U.S. 335), noting especially the Solicitor General's concession that "the administrative remedies * * * have either been exhausted or are nonexistent."

¹² Petitioner initially took an appeal only from the district court's denial of his request for an injunction against transfer outside the judicial district. On March 17, 1970, that appeal was dismissed by the Ninth Circuit on petitioner's request. In the subsequent appeal from the district court's order staying further proceedings, petitioner did not contest the earlier stay pending a decision by the Army correction board, and he has not done so before this Court.

that application of the rule of exhaustion of administrative remedies requires the exercise of judicial discretion. See *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 282. That discretionary power has not been abused, in our view, where its exercise merely results in a postponement of judicial review until it is known whether petitioner's recourse to "competent" administrative channels (*Parisi v. Davidson*, 396 U.S. 1233, 1234 (opinion of Douglas, J.)) will moot the controversy.¹³ Moreover, in the instant case the district court (App. 30), having decided to "retain jurisdiction * * * until decision * * * by the [Army correction board]," took the additional precaution of ordering that petitioner not be assigned in the interim "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties."¹⁴ In these circumstances, we think that the court cannot be faulted

¹³ This is not a case in which an application of the exhaustion doctrine would foreclose all access to the federal courts. In such situations, this Court has indicated, in the context of a state prisoner seeking habeas corpus relief in federal courts, that judicial discretion should be more narrowly defined to permit its exercise only where it is clear that there has been a "deliberate by-passing of state procedures." *Fay v. Noia*, *supra*, 372 U.S. at 439.

¹⁴ Army Regulation AR 635-20, paras. 6(a) and (d), requires assignment of servicemen claiming conscientious objector status to "duties providing the minimum practical conflict with their asserted beliefs" pending a final decision on their application by the Adjutant General; if he denies relief, it provides that they may "be assigned to any duties, or be required to participate in any type of training" even though they seek further review by the Army Board for Correction of Military Records. Appendix A, *infra*, p. 57.

for its initial refusal to entertain petitioner's habeas application.

2. Not long after this determination by the district court, but over a month before ABCMR rendered its decision, petitioner received orders to report to a West Coast departure station for assignment to noncombatant military service in Vietnam (*supra*, p. 4). On his ensuing applications for a stay of deployment, these orders came under the close scrutiny of two Ninth Circuit judges (App. 32-33) and Mr. Justice Douglas (App. 34-37), respectively; in each instance, they were upheld. As Mr. Justice Douglas pointed out (App. 36-37; 396 U.S. at 1234):

Applicant is at present assigned to duties of "psychological counseling." It would seem off-hand that "psychological counseling" in Vietnam would be no different from "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.

I heretofore granted like stays * * * involving deployment of alleged conscientious objectors to Vietnam. * * * But this case is different because of the protective orders issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. * * *

Petitioner nonetheless refused to board the plane to Vietnam on January 7, 1970; he was charged with "wilfully disobey[ing] a lawful command of his superior commissioned officer" (U.C.M.J., 10 U.S.C. 890) and confined to the post stockade.

Approximately one month later, ABCMR upheld the denial of petitioner's conscientious objector claim (see n. 3 *supra*) and thus eliminated the prior bar to habeas corpus; the district court then issued its show cause order as to why it should not entertain the application for extraordinary relief. But, as noted by the court below (App. 67-68), "charges had then already been filed against Parisi by the military authorities, the tribunal that was to judge him had already been convened, and the trial itself was imminent."

3. In light of this turn of events, the issue now before the Court is not, as petitioner would have us believe, identical to the question that confronted the Second Circuit in *Hammond v. Lenfest*, 398 F. 2d 705 (C.A. 2). There, at the time that the serviceman's conscientious objector claim was denied by the final administrative authority (the Chief of the Bureau of Naval Personnel),¹⁵ no court-martial charges were pending.¹⁶ The court of appeals, carefully limit-

¹⁵ As already noted (*supra*, n. 11), the Board for Correction of Navy Records does not take cognizance of in-service conscientious objector claims.

¹⁶ This was also the situation in *Crane v. Hedrick*, 284 F. Supp. 250 (N.D. Cal), and *Talford v. Seaman*, 306 F. Supp. 941 (D. Md.), two cases on which petitioner places heavy reliance. In *Crane*, although the applicant had jumped ship prior to filing his habeas corpus application, the Navy declined to prefer court-martial charges against him (284 F. Supp. at 251, 252-253). In *Talford*, the applicant was similarly subject to court-martial, but the Army decided not to press charges against him until after the civil court had disposed of his request for extraordinary relief, and, if he prevailed in the district court, to abandon court-martial proceedings altogether (306 F. Supp. at 944).

ing its holding to "the precise contentions and factual situation presented" (398 F. 2d at 710), rejected the argument that in such circumstances Hammond's claims were not ripe for judicial review because he could still disobey a lawful military order and raise his claims as a defense to the ensuing court-martial. Compare *Noyd v. McNamara*, 378 F. 2d 538 (C.A. 10). To "require that Hammond await the outcome of a yet to be convened court martial before petitioning for a writ of habeas corpus" (398 F. 2d at 713), and thus force him to "risk * * * the imposition of additional sanctions" (398 F. 2d at 714) was, in the court's view, too harsh a condition to judicial review of a final administrative determination by the military with respect to conscientious objector status. Moreover, as the Second Circuit pointed out, Hammond was without "power to convene the court martial that is supposedly to judge him" (*ibid.*); accordingly, compelling him to await such further enforcing procedure as the agency might or might not choose to initiate offered no real remedy.¹⁷ And see *Crane v. Hedrick*, *supra*; *Talford v. Seaman*, *supra*.

¹⁷ Hammond could not, at that time, have initiated habeas corpus proceedings in the Court of Military Appeals to test the lawfulness of the Secretary's action. Under the All Writs Act, 28 U.S.C. 1651, that court is empowered to grant extraordinary relief only in appropriate cases that fall within its Article 67 jurisdiction (see pp. 42; 45, *infra*). Accordingly, before the Court of Military Appeals could have properly entertained a habeas corpus application in Hammond's case, the issue of wrongful-denial-of-discharge would first have had to be litigated in court-martial proceeding for disobedience of military orders, and the decision reviewed by the Court of Military Review. See *Mueller v. Brown*, 18 U.S.C.M.A. 534, 40 C.M.R. 246.

In response to *Hammond*, the Department of Justice has abandoned the position it took in that case and in *Noyd v. McNamara*, *supra*. Following the lead of the Second Circuit, it now supports review by the civil courts in comparable situations: "If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts." See Appendix C, *infra*, p. 61.¹⁸

But the instant case does not fit that category. Here, as earlier indicated, by the time ABCMR had decided that petitioner was not entitled to conscientious objector status, and thus eliminated the prior bar to habeas corpus, court-martial charges had already been preferred. An application of the exhaustion principle in these circumstances would therefore not require petitioner " * * * to commit a fur-

¹⁸ We first informed the Court of this new policy in our memorandum in *Craycroft v. Ferrall*, No. 718 Misc., October Term, 1969, certiorari granted and cause remanded to the Ninth Circuit, 397 U.S. 335. More recently, we took the same position in *Polsky v. Wetherhill*, No. 1656, October Term, 1970, certiorari granted and cause remanded to the Tenth Circuit for consideration on merits, 403 U.S. 916. In *Polsky*, the Tenth Circuit sitting *en banc*, despite the fact that the government had intentionally acquiesced in habeas corpus jurisdiction, decided *sua sponte*, to adhere to its earlier ruling in *Noyd v. McNamara*, *supra*, by requiring exhaustion of not yet convened court-martial proceedings as a condition to its consideration of Polsky's conscientious objector claim. We disagreed with that determination and recommended that the case be remanded for consideration on the merits of Polsky's claim (Memorandum for the United States, No. 1656, October Term, 1970).

ther military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful" (App. 68). Whatever the "risk of * * * imposition of additional sanctions" (*Hammond v. Lenfest*, 398 F. 2d at 714), petitioner has already undertaken that risk by failing to comply with a military order. Having traversed that route, and military judicial proceedings being commenced, before a final administrative ruling on his conscientious objector application, it was, we think (see Appendix C, *infra*, p. 61), incumbent upon him to exhaust his military judicial remedies before gaining access to the civilian courts by way of habeas corpus. See *Gusik v. Schilder*, 340 U.S. 128; *Noyd v. Bond*, 395 U.S. 683; and *cf. Hammond v. Lenfest, supra*, 398 F. 2d at 713.¹⁹ And, indeed, the only two circuit courts that have yet had occasion to rule on the exhaustion question in this context have so held.²⁰ See *In re Kelley*, 401 F. 2d

¹⁹ Following *Hammond*, the Second Circuit was presented with the question that is now before the Court in this case in *United States ex rel. Mankiewicz v. Ray*, 399 F. 2d 900 (C.A. 2); but found it unnecessary to decide the issue. As pointed out by Judge Friendly, concurring (399 F. 2d at 902), *Hammond* has not yet been extended "to a case where a court-martial had already been convened and there was no adequate showing that it would not consider Mankiewicz' defense."

²⁰ The two district court decisions that seemingly take a contrary view are *Gann v. Wilson*, 289 F. Supp. 191 (N.D. Cal.), and *Cooper v. Barker*, 291 F. Supp. 952 (D. Md.), both cited by petitioner. Those cases, however, each involved the situation where an already convened court-martial was trying the serviceman for disobeying an order to wear his uniform; as to that offense, the contention that the Secretary's administrative denial of conscientious objector status was

211 (C.A. 5); *Locks v. Laird*, 441 F.2d 479 (C.A. 9).²¹

4. The reason for such a rule is admittedly not grounded on the same consideration that this Court viewed as "pivotal" in a separate context in *McGee v. United States*, 402 U.S. 479: i.e., to allow the administrative agency "to make a factual record, or to exercise its discretion or apply its expertise" 402 U.S. at 485. Compare *McKart v. United States*, 395 U.S. 185. Plainly, judicial review of the factual basis for the Army's denial of petitioner's conscientious objector claim does not require an interpreta-

without basis in fact is concededly no defense (see *Coombs v. Commanding General*, W.D. La., Civ. No. 16,573, decided August 21, 1971, slip op. p. 2; and see *infra* p. 35 n. 34). Consequently, the court-martial proceedings offered no opportunity for further consideration within the military of the claims raised in the habeas corpus applications; the district courts' refusal to *Gann* and *Cooper* to require exhaustion of pending judicial remedies in such circumstances was proper. Cf. *Wolff v. Selective Service*, 372 F. 2d 817, 825 (C.A. 2). Here, by contrast, the claim raised in the habeas corpus application is considered an available defense to the court-martial charge of refusal to obey an order of deployment to Vietnam. See discussion *infra*, pp. 32-38.

²¹ Only one of the four petitioners in *Locks* was facing court-martial proceedings at the time that the habeas corpus application was filed. As to that petitioner, we are of the view that the Ninth Circuit's application of the exhaustion doctrine was correct. The other three petitioners in that case stood on a different footing, however. Whether or not it was proper also to defer consideration of their identical claims because "a declaratory judgment of unconstitutionality would for all practical purposes terminate the criminal case against" the one who had failed to exhaust (441 F. 2d at 480), is a question we need not reach at this time.

tion of "extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence" (*Noyd v. Bond*, *supra*, 395 U.S. at 696). The underlying rationale rests, instead, on other considerations which, we submit, require civilian deference to military tribunals in the circumstances of this case.

Those in the armed services are necessarily subject to stricter standards of discipline and duty than are civilians. See generally *Burns v. Wilson*, *supra*, 346 U.S. at 140; *Orloff v. Willoughby*, 345 U.S. at 95; *Reid v. Covert*, *supra*, 354 U.S. at 38-39. Long ago, our Founding Fathers granted to the Congress "authority to regulate the armed forces in order to enforce obedience by members of the military establishment to military regulation during their service to the end that order may be ensured." *Toth v. Quarles*, *supra*, 350 U.S. at 31 (Reed, J., dissenting).²² Pursuant thereto, Congress has devised a separate, autonomous military judicial system (see n. 7 *supra*) to maintain control, morale and discipline. See U.C.M.J., Arts. 16-21, 65, 66, 67, 10 U.S.C. 816-821, 865, 866, 867. As this Court declared in *Toth* (350 U.S. at 22): "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order." After trial by court-martial, review is available in

²² In addition to its power "To raise and support Armies" and "To provide and maintain a Navy" (Art. I, Sec. 8, cls. 12 and 13), Congress is expressly given power "To make Rules for the Government and Regulation of the land and naval Forces" (*id.* at 14).

most cases by a Court of Military Review, composed of a panel of three military judges (see U.C.M.J., Art. 66, 10 U.S.C. 866).²³ And, "[w]hen, after the second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond*, *supra*, 395 U.S. at 694.²⁴

Just as in a Selective Service context "the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created" (*McKart v. United States*, 395 U.S. at 195), so too in the present context, it must be adapted to the special features of this internal review machinery

²³ The Court of Military Review, the members of which must be admitted to the bar of a federal court or the highest court of a state, is empowered to review all court-martials in which the sentence "affects a general or flag officer, or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." U.C.M.J., Art. 66(b) 10 U.S.C. 866(b). Prior to review of such court-martials, the sentence must have been approved by the convening authority, with the advice of the staff judge advocate (U.C.M.J., Arts. 64, 65(a), 10 U.S.C. 864, 865(a)). The record is then sent to The Judge Advocate General who refers it to the Court of Military Review if the sentence is within the jurisdiction of that body. See U.C.M.J., Art. 66(b), 10 U.S.C. 866(b).

²⁴ See U.C.M.J., Art. 67, 10 U.S.C. 867. And see discussion *infra*, pp. 42-45.

that has been set up for the military. Responsibility for maintaining order and discipline within the armed services has been vested by Congress in military tribunals; it is not a function of the civil courts. Where, as here, a serviceman chooses, "with all attendant risks, to disobey a military order to enplane for Vietnam" (App. 63), the statutory scheme calls for civilian deference to judicial review by the agency which "has a proper concern in keeping its own house in order" (*O'Callahan v. Parker*, *supra*, 395 U.S. at 282; Harlan, J., dissenting).

Whether or not petitioner's wilful disobedience of a lawful order of deployment (see p. 21 *supra*) can be justified on grounds of wrongful denial by the Army of conscientious objector status is, accordingly, a matter to be considered and resolved in the first instance by the military.²⁵ Perhaps the various tri-

²⁵ The present situation is to be distinguished from those cases involving servicemen who have been denied conscientious objector status by the Selective Service System, and who then submit to induction and immediately file a petition for habeas corpus to test the legality of induction. See *Eagles v. Samuels*, 329 U.S. 304; *Oestereich v. Selective Service Board*, 393 U.S. 233, 235-236 n. 5. In such cases, the claim is that the military has no authority over the applicant due to an error by the civilian agency; recourse to the military courts is thus not required (*supra* n. 9). Here, by contrast, the assertion is that the military authorities—who concededly have jurisdiction over petitioner—erred in their application of military law. That is properly a question to be resolved in the first instance by the tribunals established exclusively to rule on military matters—especially where, as here, the issue is already pending before the military courts at the time that petitioner has finally exhausted his military administrative remedies.

bunals within the armed services can bring more expertise to the question of the validity of petitioner's claim than can the civil courts, but they are no less competent to pass on the facts on basis for the administrative refusal of discharge. Compare *McKart v. United States*, *supra*, 395 U.S. at 198-199; and see *Wills v. United States*, 381 U.S. 2d 943, 945 (C.A. 9), certiorari denied, 392 U.S. 908; *Wolff v. Selective Service*, *supra*, 372 F. 2d 825.²⁶ Permitting them first to do so does not

²⁶ Petitioner contends that the Army's denial of his conscientious objector claim presents an issue "of conflict with constitutional due process standards by the military" (Pet. Br. 47, n. 15); he suggests that because he has framed his claim in constitutional terms, civilian courts may intervene immediately, under the authority of *Dombrowski v. United States*, 380 U.S. 479, and succeeding cases, without regard to the competence of the military tribunals to pass on the question. But *Dombrowski* involved federal intervention in state prosecutions brought in bad faith under an overly-broad state statute regulating free expression. Because the activity challenged there had a "chilling effect" on First Amendment freedoms (380 U.S. at 486-487), and also involved harrassing tactics that were conducted by state officials in bad faith (*Younger v. Harris*, 401 U.S. 37, 50), the federal courts intervened. Here, by contrast, we are concerned neither with an asserted chill on First Amendment rights, nor with any evidence that the Army has acted in bad faith (see p. 21 *supra*). See *Locks v. Laird*, *supra*, 441 F. 2d at 480-481. The analogy to *Dombrowski* and related cases is, therefore, imperfect. Whether petitioner challenges the Army's refusal to discharge him in terms of violating constitutional due process or, alternatively, as in conflict with its own regulations, the issue presented here is in the final analysis simply whether the denial of petitioner's conscientious objector claim is without factual basis. Resolution of that essentially fact-question (see *McGee v. United States*, *supra*, 402 U.S. at 486) is well within the competence of the military tribunals.

and control
by reprimand
remedies within
the military.

will be no need for civilian judicial intervention." See *Beard v. Stahr*, 370 U.S. 41; *In re Kelly*, *supra*. And cf. *Craycroft v. Ferrall*, *supra*, 408 F. 2d at 596.

²⁷ A serviceman who elects to disobey the orders of his commanding officer on grounds of conscientious objection should not thereafter be permitted to delay, and perhaps avoid, court-martial proceedings by presenting his claim to the civilian courts by way of habeas corpus. As pointed out by the court below (App. 70-71): "While Parisi may honestly have disagreed [with his redeployment orders], that disagreement cannot be held to have justified his unilateral determination to defy his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise similar discretion, necessary military discipline would collapse."

of exemption from combatant training and service for civilians conscientiously opposed to participation in war in any form,²⁸ no provision for discharge from the military of the in-service conscientious objector existed until 1962. In that year, a change in military regulations²⁹ permitted servicemen, whose op-

²⁸ See, *e.g.*, Selective Service Draft Law of 1917, 40 Stat. 76, 78; Selective Training and Service Act of 1940, 54 Stat. 885, 889; Universal Military Training and Service Act of 1948, 62 Stat. 604; Military Selective Service Act of 1967, 81 Stat. 100, 104.

²⁹ Department of Defense (DOD) Directive No. 1200.6 (August 21, 1962) was issued by the Secretary of Defense pursuant to his authority in 10 U.S.C. 133. Its purpose was stated as providing "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." The directive was replaced by DOD Directive

³⁰ The various branches of the Armed Services promulgated regulations which provided for an elaborate administrative review machinery of conscientious objector applications. The applicant is to be interviewed separately by a chaplain and psychiatrist (or medical officer), and each is to prepare a written report of the interview. He is also afforded an opportunity to appear before a hearing officer knowledgeable in policies and procedures relating to conscientious objector methods. The applicant's file is then forwarded to Departmental headquarters and reviewed by a special Conscientious Objector Review Board. See generally Army Regulation AR 635-20 (January 1, 1970); Navy Department BUPERINST 1900-5 (July 18, 1968); Air Force Regulation AFR 35-24 (March 25, 1969); Marine Corps Order MCO 1306.16B (June 18, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

³¹ Compare, e.g., *United States v. Dunn*, 38 C.M.R. 917, and *United States v. Taylor*, 37 C.M.R. 547—considering the defense to be unavailable—with, e.g., *United States v. Quirk*, 39 C.M.R. 528, and *United States v. Sigmon*, C.M. 416,356 (decided January 2, 1968)—recognizing such a defense.

C.M.R. 195, and explicitly recognized the claim of wrongful administrative-refusal-of-discharge as an available defense. *Noyd* involved an officer in the Air Force who, after being denied conscientious objector status, refused to obey an order to instruct student pilots how to fly an F-100 aircraft, "a fighter plane used in Vietnam by the Air Force" (18 U.S.C.M.A. at 486, 40 C.M.R. at 198). Then Chief Judge Quinn, in an opinion concurred in by Judges Darden and Ferguson,³² stated (18 U.S.C.M.A. at 492, 40 C.M.R. at 204):

Obviously mindful of the conflict between the needs of the service and the plight of the conscientious objector, the regulation directs that, pending consideration of an application by the Secretary, the conscientious objector be assigned duties providing 'minimum conflict with his professed beliefs' * * * Colonel Hansen testified he gave the accused the order to fly an F-100 instructor only after he had been informed the application for separation had been denied. The validity of the order, therefore, depended upon the validity of the Secretary's decision. * * * If the Secretary's decision was illegal, the order it generated was also illegal. * * *

On this reasoning, an attack on the lawfulness of the Secretary's action can now properly be entertained in court-martial proceedings, either on the

³² These three judges have been appointed to the Court of Military Appeals for terms of fifteen years, respectively. See U.C.M.J., Art. 67, 10 U.S.C. 867. Senior Judge Ferguson's term recently expired and he is presently sitting until a new judge is appointed.

ground that it is without factual basis, or that it is premised on an erroneous legal standard, or that it involves a matter outside the scope of the Secretary's authority. See *United States v. Goguen*, No. 421,998 (A.C.M.R., September 2, 1970), a copy of which is annexed hereto as Appendix D, *infra*, pp. 63-81.³³

It has been made clear, however, that *Noyd* is not of unlimited scope. Where the legality of the questioned military order remains unaffected by the lawfulness of the administrative refusal of discharge—as where a soldier disobeys an order to wear his uniform—the *Noyd* defense is unavailable. See *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100; *United States v. Goguen*, *supra*, at Appendix D *infra*, pp. 76-77.³⁴ Nor can the claim of

³³ *Goguen* was subsequently reversed and the charges dismissed by the Court of Military Appeals (20 U.S.C.M.A. 527, 43 C.M.R. 367) on the ground that Goguen had been released from the custody of the Army pursuant to an order of discharge by the United States District Court for the District of New Jersey (*Goguen v. Clifford*, 304 F. Supp. 958).

³⁴ The military has put those claiming an in-service conscientious objection on notice that they need not perform "duty assignments" directly in conflict with their asserted beliefs while their applications for discharge are being processed through administrative channels. AR 635-20. Thus, the refusal to obey a specific "duty assignment" which is deemed to present such a conflict—whether it be to fly as an F-100 instructor or to report for noncombatant duty in Vietnam—can, consistent with announced military policy, be excused on a showing of wrongful denial of conscientious objector status. But, as a practical matter, the military cannot permit servicemen claiming discharge because of opposition to war to ignore with impunity the more general obligations of military life, such as wearing a uniform. While this require-

conscientious objection be raised in the military tribunals where no application for discharge has yet been processed through the appropriate administrative channels. *United States v. Avila*, 41 C.M.R. 654; *United States v. Kent*, *supra*, 40 C.M.R. at 405-406. And the military courts have refused to entertain the claim of wrongful refusal on a preliminary application to stay court-martial proceedings, leaving the question to be resolved at the court-martial. *Lee v. Peterson*, 18 U.S.C.M.A. 545, 40 C.M.R. 257.

The instant case, however, does not fall within the *Wilson*, *Avila* or *Peterson* exceptions; it is, in all material respects, essentially indistinguishable from *United States v. Noyd*, *supra*. Petitioner does not dispute this; instead, he points to the recent decision by the Court of Military Appeals in *United States v.*

ment might conceivably, to some, be as repugnant to conscience as a specific duty assignment, the orderly functioning of the military necessitates compliance with such orders until actual release from military service. As stated in *Goguen* (Appendix D, *infra*, p. 76): "Obviously, it is impracticable in the military environment to permit the applicant to cast off his uniform." The claim of conscientious objection is, therefore, no defense to disobedience of a general order to wear a military uniform; the overriding need for discipline and control within military ranks puts such orders on a different footing from the order to report to a new duty assignment, such as was involved in *Noyd* and is involved here. See *United States v. Stewart*, 20 U.S.C.M.A. 272, 277, 43 C.M.R. 112, 119 (Quinn, C.J., concurring in part); cf. *United States v. Kent*, *supra*, 40 C.M.R. 404, 406; review denied, 39 C.M.R. 293. Even if petitioner had prevailed on his claim, he would have been required to wear his uniform during the short period of time that it would have taken the military to process his application for discharge; but the Army could not give a new duty assignment to someone found by the military to be entitled to discharge.

Stewart, 20 U.S.C.M.A. 272, 43 C.M.R. 112, as casting doubt on the continuing vitality of *Noyd*. Judge Dardin (now Chief Judge) wrote the opinion of the court in *Stewart*, and he appears to have adopted the view that *Noyd* should be limited to the situation where there exists a "conflict between an order given the accused while his [conscientious objector] application [is] pending [before military administrative channels] and the regulatory provision prohibiting the accused's assignment to duties inconsistent with his professed beliefs" (20 U.S.C.M.A. 276 n. 1). Even within these limits, it would seem that *Noyd* requires that petitioner's court-martial entertain the claimed defense in the present circumstances.³⁵

We need not speculate about the effect of Judge Dardin's opinion on the instant case, however. Significantly, the other two members of the court expressly declined to follow his lead in this regard and reaffirmed the broader position they took in *Noyd*. Then Chief Judge Quinn declared (20 U.S.C.M.A. at 277, 43 C.M.R. at 117):

I disagree with the repudiation of United States v. Noyd * * *. In my opinion an order by a subordinate military authority, which has its origin in, and takes its content from, an illegal action by a service Secretary is not a law-

³⁵ Petitioner's argument is that his order of deployment to Vietnam, issued while his application was before the ABCMR, is in direct conflict with the regulation. Whatever the merit to that contention—and we think there is little (see n. 14 *supra*)—it is essentially no different from the claim involved in *Noyd*.

ful order, and cannot be the foundation for a charge of disobedience of a "lawful command"

* * *

Because he concluded that the court-martial proceeding in *Stewart* involved only the disobedience of an order to wear a military uniform,³⁶ he was able to concur in the result reached by Judge Dardin—i.e., that the lawfulness of the Secretary's denial of discharge was not a question to be considered in assessing the validity of this type of military order. See *United States v. Goguen*, *supra*; and see n. 34 *supra*. Judge Ferguson, however, disagreed with the Chief Judge on this point, and, because he read the order as one of deployment for overseas duty (see n. 36 *supra*), he dissented.

To the extent, then, that *Stewart* seems to circumscribe the holding in *Noyd*, it represents the view of only one judge. The majority of the Court of Military Appeals still adheres to the position that the claim of wrongful refusal of discharge is an available affirmative defense to court-martial charges of wilful disobedience of an order of deployment to Vietnam. See *United States v. Larson*, 20 U.S.C.M.A. 565, 43 C.M.R. 405. And this view is shared by the Army Court of Military Review. See *United States v. Goguen*, *supra*; *United States v. May*, 41 C.M.R. 663.

³⁶ Stewart was ordered to "put on your uniform to continue your movement to your overseas destination in compliance with your written overseas movement orders" (20 U.S.C.M.A. at 277, 43 C.M.R. at 117).

Moreover, as noted by the court below (App. 91 n. 12), "Pariši himself argued at his court-martial that *United States v. Noyd* * * * had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of lawfulness of the order alleged to have been disobeyed." The military judge took cognizance of the affirmative defense, examined "the entire file and the entire record" (App. 89 n. 11) and held that (App. 90-91 n. 11): "There has been no deprivation of administrative due process and I find from the examination of this record that the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive [*sic*] discretion." Acknowledging that use of the "arbitrary, capricious" standard "may be saying in different words that I am ruling on the basis in fact," the military judge added (App. 90 n. 11): "But I do not consider that to be—and I want the record to so reflect, so you may have an opportunity to get a definite ruling on it * * *." Of course, if a different standard has in fact been invoked,³⁷ that is a matter to be remedied by the Army Court of Military Review, which already has ruled "* * * that the same judicial review should be afforded in-service conscientious objection determina-

³⁷ We are inclined to the view that the standard invoked in petitioner's court-martial is fundamentally no different from the "basis in fact" standard. In any event, since the "no basis in fact" test is generally considered the "narrowest known to law" (*Blalock v. United States*, 247 F. 2d 615, 619 (C.A. 4)), any difference is probably not to petitioner's disadvantage. Cf. *Sanford v. United States*, 399 F. 2d 693 (C.A. 9).

tions as are provided in the case of pre-induction decisions." *United States v. Goguen, supra*, Appendix D, *infra*, p. 75.³⁸

At all events, it seems clear that the affirmative defense of wrongful refusal of discharge is one that the military tribunals will entertain when reviewing the type of order that is involved here; petitioner's own court-martial is an example. It is, therefore, entirely proper to require him to pursue his available remedies in that forum before allowing him access to the civil courts to litigate the lawfulness of the Secretary's denial of his conscientious objector application.³⁹ See *In re Kelly, supra*; *Locks v. Laird, supra*;

³⁸ The Court of Military Review "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." U.C.M.J., Art. 66 (c), 10 U.S.C. 866(c).

³⁹ Petitioner suggests that because it is possible for the Court of Military Review to acquit him on separate grounds, without reaching the question of the lawfulness of the Secretary's disapproval, he should not be required to exhaust. While such a contingency cannot be completely discounted, it seems exceedingly remote in the present case—the only other unrelated grounds asserted by petitioner before the military tribunal are (1) that he was denied due process because he was represented by military, rather than civilian, counsel at the Article 32 pretrial investigation (10 U.S.C. 832), and (2) that he was improperly ordered overseas without first being given a two-hour "orientation" briefing (a requirement that once existed under Army Regulation 612-35, but had been suspended prior to petitioner's orders by a superseding regulation, AR 612-2 (October 1, 1969); see *Drifka v. Brainard*,

Thompson v. Wetherill, W.D. Okla., Civ. No. 70-167, decided April 21, 1970; and cf. *McFadden v. Selective Service System*, 415 F. 2d 1140, 1141 (C.A. 9).

2. Nor is it accurate to suggest that the military is powerless to order petitioner's discharge if its courts should ultimately acquit him of the pending court-martial charges on the ground that the Secretary's disapproval was without basis in fact. Such a ruling by the military tribunals amounts to a determination that petitioner is entitled to separation from the Army as a conscientious objector. It is *res judicata* between the individual and the Army. Thus, the Secretary "has no practical alternative except to discharge the member." *United States v. Stewart*, *supra*, 20 U.S.C.M.A. at 276. In such circumstances, the Adjutant General of the Army is required by regulation (AR 635-200) to follow the same procedures that apply when "[t]he discharge or release of an individual from the Army [is] ordered by a U.S. Court or judge thereof." See Appendix A, *infra*, p. 58. Specifically, upon proper notification he is to " * * * take appropriate action to direct the discharge, release from active military service, or re-

294 F. Supp. 425 (W.D. Wash)). In any event, petitioner should not now be permitted to deprive the Court of Military Review of the opportunity to pass on the questions relating to his conscientious objector claim merely because he has raised additional issues in that court. As this Court observed in *Gusik v. Schilder*, *supra*, 340 U.S. at 133, if resort to the military tribunals does ultimately prove to be "futile," "[h]abeas corpus will then be available to test any questions of jurisdiction which petitioner may offer."

lease from military control of the individual concerned" (*ibid.*).

Moreover, petitioner has an available remedy by way of habeas corpus in the Court of Military Appeals. It is, of course, upon this court, comprised solely of civilian judges (U.C.M.J., Art. 67, 10 U.S.C. 867), that Congress has conferred "a general supervisory power over the administration of military justice." *Gale v. United States, supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306. Its "delicate perceptions," it has been said, "have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum.L.Rev. 40, 57 n. 87 (1961).⁴⁰ Endowed by Congress with appellate jurisdiction over military criminal proceedings (U.C.M.J., Art. 67, 10 U.S.C. 867), the Court of Military Appeals also claims "incidental powers" (*In re Taylor*, 12 U.S.C.M.A. 427, 430, 31 C.M.R. 13, 16) that enable it to "[mold] military practice by way of adjudication" (*United States v. Rinehart*, 8 U.S.C.M.A. 402, 409, 24 C.M.R. 212, 216) in appropriate circumstances. See *Gale v. United States, supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306.

It now seems well settled that this military court has ample power under the All Writs Act, 28 U.S.C. 1651(a), to issue an emergency writ of habeas cor-

⁴⁰ See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 189 (1962).

pus in cases, like the present one, which are subject to its jurisdiction. See, *e.g.*, *Noyd v. Bond*, *supra*, 395 U.S. at 695; *United States v. Augenblick*, *supra*, 393 U.S. at 350.⁴¹ Its ability to do so as a function of its responsibility for "the protection and preservation of the Constitutional rights of persons in the armed forces" was explicitly recognized in *United States v. Frischholz*, 16 U.S.C.M.A. 150, 152, 36 C.M.R. 306, 308. As the Court of Military Appeals stated more recently in *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10, 12, "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." See also *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399. Accordingly, on numerous occasions, this tribunal has entertained habeas corpus applications by servicemen seeking release from military confinement (see, *e.g.*, *Dale v. United States*, 19 U.S.C.M.A. 254, 41 C.M.R. 254; *Horner v. Resor*, 19 U.S.C.M.A. 285, 41 C.M.R. 285; *United States v. Bevilacqua*, *supra*; *Levy v. Resor*, *supra*), and it has not hesitated to grant the relief requested where it deemed such action to be appropriate (see, *e.g.*, *United States v. Jennings*, 19 U.S.C.M.A. 88; 41 C.M.R. 88; *Johnson v. United States*, 19 U.S.C.M.A. 407, 42 C.M.R. 9).

⁴¹The Court of Military Appeals has jurisdiction to review all cases reviewed by a board of review "which the Judge Advocate General orders sent to the Court of Military Appeals for review" (U.C.M.J., Art. 67(b)(2), 10 U.S.C. 867(b)(2)) or "in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted review" (U.C.M.J., Art. 67(b)(3), 10 U.S.C. 867(b)(3)).

Admittedly, most of the cases in which the highest military tribunal has been called upon to exercise its extraordinary power under the All Writs Act have involved servicemen seeking release from confinement within the military pending appeal from court-martial conviction. See, *e.g.*, *Noyd v. Bond*, *supra*, 395 U.S. at 695. The Court of Military Appeals has not yet had occasion to speak to the question whether its habeas corpus jurisdiction also permits issuance of the writ in favor of a serviceman concededly entitled to discharge from the military as a conscientious objector.⁴² It has, however, discussed its power to grant extraordinary relief in broad terms in "cases in which [it has] jurisdiction to hear appeals or * * * to which [its] jurisdiction may extend when a sentence is finally adjudged and approved." *United States v. Snyder*, 18 U.S.C.M.A. 480, 482, 40 C.M.R. 192, 195; *United States v. Bevilacqua*, *supra*, 18 U.S.C.M.A. at 11, 39 C.M.R. at 11. While it has emphasized that "resort to extraordinary [remedies such as those available] under the All Writs Act * * * cannot serve to enlarge [its] power to review cases," the court has hastened to add that habeas corpus relief is appropriate "to aid [it] in the exercise of the authority [it] already has." *United States v. Snyder*, *supra*, 18 U.S.C.M.A. at 483, 40 C.M.R. at 195.

⁴² We are advised by the Department of the Army that recourse to the Court of Military Appeals for habeas corpus relief in such circumstances has not been necessary, since upon a determination of lack of jurisdiction by a military tribunal the serviceman is administratively discharged pursuant to Army Regulation AR 635-200. Cf. *United States v. May*, 41 C.M.R. 663.

Consequently, where a military court over which the Court of Military Appeals concededly has jurisdiction, or the Court of Military Appeals itself, determines that a serviceman has been wrongfully denied discharge as a conscientious objector, there seems every reason to assume that the highest military tribunal will entertain a habeas corpus petition seeking to effectuate that discharge as a legitimate exercise of its "supervisory power over the administration of military justice." *Gale v. United States*, *supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306.⁴³ It does not thereby enlarge its authority to review cases; in such circumstances the issue whether the Secretary's disapproval of the application has factual basis has already been considered and resolved by the military courts. Rather, resort by the Court of Military Appeals to its power under the All Writs Act, in order to afford the relief to which the applicant is clearly entitled, serves in a very real sense to aid the court in the exercise of its jurisdiction. It is both "incidental to, and protective of, those [powers] defined in Article 67." *United States v. Bevilacqua*, *supra*, 18 U.S.C.M.A. at 11, 39 C.M.R. at 11.

⁴³ This seems implicit in *Mueller v. Brown*, *supra*. There, the Court of Military Appeals declined to entertain a habeas corpus application for discharge, premising its decision solely on the ground that the applicant had not yet litigated his claim in court-martial proceedings (see n. 17 *supra*). The clear implication is that where such claim has been scrutinized by military tribunals in cases falling within the jurisdiction of the highest military court, a habeas corpus application for release from the Army can properly be entertained.

The slim possibility that the Court of Military Appeals might not entertain habeas corpus jurisdiction if petitioner should ultimately prevail on the merits of his claim is not sufficient basis for relaxing the exhaustion requirement. *Gusik v. Schilder, supra*, 340 U.S. at 133. As this Court stated in *Gusik, supra*: "If [that] proves to be, no rights have been sacrificed. Habeas corpus will then be available to test any question of jurisdiction which petitioner may offer."⁴⁴

D. The Factor of Delay

By deferring to the military tribunals before whom the "basis in fact" question is already pending, civil courts do not foreclose the habeas corpus applicant from ever subjecting his claim to civilian scrutiny. Compare *McKart v. United States, supra*, 395 U.S.

⁴⁴ Moreover, whether or not habeas corpus relief is available in the Court of Military Appeals may well be an academic question in the circumstances of this case. The district court has retained jurisdiction; it stayed the proceedings "until there has been trial and a final judgment in the military courts on the court martial charges presently pending against petitioner" (App. 53). Thus, if petitioner should be acquitted by the Court of Military Review on grounds that the denial of his conscientious objector application was without basis in fact, he could immediately gain access to the district court to seek discharge from service; he would not first be required to request extraordinary relief from the Court of Military Appeals. No longer would recourse to the civil courts interrupt the military judicial process, interfere with military discipline, or deprive the military of an opportunity to correct its own errors. Exhaustion of remaining military remedies would thus serve no overriding purpose and need not be required.

at 197; *McGee v. United States*, *supra*, 402 U.S. at 489. The effect of an application of the exhaustion doctrine in the present context is, instead, merely to delay consideration by the federal courts until it becomes clear that a final determination of the issues has been made within the military judicial system and a live controversy still remains. See *Noyd v. Bond*, *supra*, 395 U.S. at 696; *Gusik v. Schilder*, *supra*, 340 U.S. at 131-132.

Petitioner contends that such delay is an unduly harsh condition to impose on servicemen seeking discharge as conscientious objectors, since it forces them to continue serving in the armed services, pending final resolution of court-martial proceedings, contrary to their professed religious opposition to war in any form. It must be remembered, however, that we are dealing here not with a person who holds such beliefs at the time he is called upon to serve, and thus disputes from the outset the military's jurisdiction over him (*supra* n. 25). Rather, petitioner voluntarily submitted to induction and willingly surrendered to the discipline and control that is an essential element of military life. If, nine months later, he declares that the commands of his conscience have changed so that they are no longer compatible with his duty assignment or the exigencies of service, that alone does not entitle him to separation from the Army or excuse him from the obligation to obey military orders.

The Secretary of Defense has promulgated a directive (DOD Directive No. 1300.6) which specifies the conditions on which conscientious objectors shall

be eligible for discharge. Those in the service who profess opposition to war in any form can no more claim separation as a matter of constitutional right than can civilian conscientious objectors seeking an exemption under statute (50 U.S.C. App. (1964 ed.) 456(j)). See, e.g., *United States v. MacIntosh*, 283 U.S. 605, 623-624; *Hamilton v. Regents*, 293 U.S. 245, 264; *In re Sommers*, 325 U.S. 561; *Welsh v. United States*, 398 U.S. 333, 356 (Harlan, J., concurring). Discharge is a matter of regulatory grace,⁴⁵ and is afforded only to those members of the armed forces who can demonstrate satisfactorily that their opposition is general and not particular (*Gillette v. United States*, 401 U.S. 437), is rooted in conscience and religion (*Welsh v. United States*, 398 U.S. 333), is sincerely held (*Witmer v. United States*, 348 U.S. 375, 381),⁴⁶ and "did not become fixed until entry into service" (DOD Directive 1300.6, para. IV(B)(2)).

Petitioner was unable to convince the Secretary of the Army and ABCMR that he qualified under the relevant criteria. Whether or not that determina-

⁴⁵ DOD Directive No. 1300.6 (May 10, 1968), para. IV (B) (1) states: "No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before the expiration of his term of service, whether he is serving voluntarily or involuntarily." And see Army Regulation AR 135-25.

⁴⁶ As this Court stated in *Gillette* (401 U.S. at 442), " * * * the standards for measuring claims of in-service objectors * * * are the same as the statutory tests applicable in a pre-induction situation." And see DOD Directive No. 1300.6, para. IV (B) (3) (b); see also AR 635-20, para. 3b.

tion should be sustained—a question which plainly cannot, and should not, be answered on the present record—petitioner remained, of course, subject to the discipline and control of the Army. In order to assure the minimum possible conflict between his asserted beliefs and his continuing obligation to serve, the district court restrained the Army from assigning him “to any duties which require materially greater participation in combat activities or combat training than is required in his present duties” (App. 30). The order to report to noncombatant duty in Vietnam complied with the court’s mandate. As Mr. Justice Douglas observed in denying petitioner’s application for stay of deployment (App. 36; 396 U.S. at 1234): “It would seem offhand that ‘psychological counseling’ in Vietnam would be no different than ‘psychological counseling’ in army posts here.”

Having deliberately elected to defy that order, petitioner is now in no position to complain of the delay occasioned by permitting the military to prosecute him for such disobedience. As the court below aptly stated (App. 70-71):

We are not blind to the possible moral dilemma that Parisi faced. We cannot quarrel with the proposition that disobedience based on the dictates of religious conscience is based on “an obligation, superior to that due the state, of not participating in way [sic] in any form.” *United States v. Seeger*, 380 U.S. 163, 172, * * *. However, the District Court’s injunction was reasonable and afforded ample protection for Parisi’s religious scruples. Three [sic] judges of our

court and our Circuit Justice found that the military order for Parisi's redeployment did not, in the circumstances, violate the District Court's protective order. While Parisi may honestly have disagreed, that disagreement cannot be held to have justified his unilateral determination to defy his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise [the same] discretion, necessary military discipline would collapse. Had Parisi bided his time it appears, on the record before us now, that he likely would have obtained the relief he sought from the District Court. If the fruits of his impatience are bitter, he has only himself to blame for production.

Moreover, the delay of which petitioner now complains is substantially of his own making. The order of the district court that is presently being contested was issued on March 31, 1970 (App. 55). Approximately one week later, on April 8, 1970, petitioner was found guilty of the court-martial charges against him, and "[t]he record of trial [was] forwarded to The Judge Advocate General of the Army for review by a Court of Military Review" on July 2, 1970 (App. 59). In the normal course of events, the reviewing court would in all probability have rendered its decision before now. Petitioner, however, through no less than seven requests for "enlargement of time," postponed filing his brief with the Court of Military Review until April 27, 1971, some nine months later. The respondents' reply brief was filed on August 2,

1971. We are advised that on September 14, 1971, petitioner's counsel informed the military court that he did not desire oral argument;⁴⁷ the court has not yet acted on the case. In these circumstances, petitioner's objection to an application of the exhaustion doctrine on the ground of "unconscionable delays" (Pet. 58) is not well taken.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

ROBERT L. KEUCH,
ROBERT A. CRANDALL,
Attorneys.

SEPTEMBER 1971.

⁴⁷ Petitioner's counsel in the present proceedings before this Court do not represent him in the proceedings before the military tribunals.

APPENDIX A

1. Article 66 of the Uniform Code of Military Justice, 10 U.S.C. 866, provides in relevant part:

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each panel shall be composed of not less than three appellate military judges. * * * Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State.

(b) The Judge Advocate General shall refer to a Court of Military Review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, shall be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

2. Article 67 of the Uniform Code of Military Justice, 10 U.S.C. 867, provides in relevant part:

(a)(1) There is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. * * * Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of a State * * *

(b) The Court of Military Appeals shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Military Review, affects a general or flag officer or extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the con-

vening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

3. The All Writs Act, 28 U.S.C. 1651(a) provides:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

4. Department of Defense Directive No. 1300.6 (May 10, 1968) provides in relevant part:

IV. Policy

B. *DoD Policy*.—Consistent with this national policy, bona fide conscientious objection as set forth in this Directive by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized. This policy will be executed subject to the following:

1. No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before the expiration of his term of service, whether he

is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service is discretionary with the military Service concerned, based on judgment of the facts and circumstances in the case.

2. A request for discharge after entering military Service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military Service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

[3] b. Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining 1-O or 1-A-O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service. [footnote omitted.]

VI. Procedures

[B] 2. Pending decision on the case and to the extent practicable the person will be employed in duties which involve the minimum conflict with asserted beliefs. This paragraph shall not be applicable where repeat applications are filed by an individual based upon substantially the same supporting information.

E. Determination by the Military Department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

5. Army Regulation AR 635-20 (August 15, 1970) provides in relevant part:

[3] b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered. Requests for discharge after entering military service will not be favorably considered when—

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based solely upon considerations of policy, pragmatism or expediency.

(4) Based on objection to a particular war.

* * * *

6. Utilization, assignment and training of applicants for discharge as conscientious objectors.

a. Except as provided in b below, individuals who have submitted formal applicants (para. 4a) for discharge based on conscientious objection will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications. In the case of trainees, this means that they will not be required to train in the study, use, or handling of arms or weapons. It does not preclude the trainees from participating in those aspects of training that do not involve the bearing or use of arms, weapons, or munitions. Except for this restriction, conscientious objector applicants are subject to all regulations to include those on training.

* * * *

d. When a request for discharge has been denied, individual will comply with reassignment orders, be assigned to any duties, or be required to participate in any type of training. Application to the Army Board for Correction of Military Records has no effect on such reassignment, performance of any duties, or participation in any type of training.

* * * *

6. Army Regulation AR 635-200 (June 12, 1968) provides in relevant part:

5-12. Lack of Jurisdiction. The discharge or release of an individual from the Army may be ordered by a U.S. Court or judge thereof. The officer upon whom such an order or writ is served will report immediately to The Judge Advocate General, as directed by MCM 1951, paragraph 217, and AR 27-5, and will notify The Adjutant General, Department of the Army, ATTN: AGPO-SS, Washington, D. C., who will take appropriate action to direct the discharge, release from active military service, or release from military control of the individual concerned. * * * Authority (AR 635-200) and SPN 316 for separation will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer, processing for discharge, or release from active duty, as appropriate. Similar action will be taken upon the final judicial determination of a convening authority of a general or special court-martial, a law officer, a president of a special court-martial, or military appellate agency that an individual is not currently a member of the Army.

APPENDIX B

DEPARTMENT OF THE ARMY

Office of the Adjutant General

Washington, D. C. 20318

AGPE-RP Parisi, Joseph

048 34 0713, US52726468 (24 Nov 69)

2 Mar 1970

PFC Joseph Parisi, 048 34 0713
Hospital Company
U. S. Army Hospital
Fort Ord, California 93941

Dear Private Parisi:

I have been requested by the Army Board for Correction of Military Records to make further reply to your request for correction of your Army records.

The administrative procedures established by the Secretary of the Army for the guidance of the Army Board for Correction of Military Records provide that the Board may deny an application where a sufficient basis for a review has not been established.

Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has been presented to indicate probable material error or injustice. Accordingly, your application was denied.

In the absence of new and material evidence tending to show the existence of error or injustice in the

military records, further consideration by the Board is not contemplated.

Sincerely,

KENNETH G. WICKHAM

KENNETH G. WICKHAM
Major General, USA
The Adjutant General

CF
Mr. Dick Goff
44 Montgomery St.
San Francisco, CA 94104

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530, October 23, 1969.

Memo. No. 652

To All United States Attorneys.

Re: Habeas Corpus Relief of Servicemen Denied
Discharge as Conscientious Objectors.

After consultation with the Department of Defense the following policy respecting review of denials of release sought under Department of Defense Directive 1300.6 has been adopted effective immediately:

1. EXHAUSTION OF MILITARY JUDICIAL REMEDIES

If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts. However, if court-martial charges have been preferred military judicial remedies must be exhausted before resort to the civil courts. The Government acquiesces in the decisions in *In re Kelly*, 401 F. 2d 211 (5th Cir. 1968) and *Hammond v. Lenfest*, 398 F. 2d 705 (2d Cir. 1968) and will no longer urge the position taken in *Noyd v. McNamara*, 378 F. 2d 538 (10th Cir. 1967).

2. EXHAUSTION OF MILITARY ADMINISTRATIVE
REMEDIES

The decision of the Military will be deemed ripe for judicial review upon the final action of the Adjutant General of the Army, the Chief of the Bureau

of Naval Personnel, the Adjutant General of the Air Force or the Commandant of the Coast Guard. Application to the Army and Air Force Boards for the Correction of Military Records will remain an available procedure but will not be insisted upon by the Government as a precondition to judicial review. The Board for the Correction of Naval Records adheres to its policy of rejecting applications for want of jurisdiction.

3. The instructions set forth in the United States Attorneys Bulletin, Vol. 17, No. 23, pp. 613-14, to the extent that they are inconsistent with the foregoing, are revoked.

WILL WILSON,
Assistant Attorney General, Criminal Division.

APPENDIX D

UNITED STATES ARMY COURT OF
MILITARY REVIEW
Washington, D. C. 20315

Before
KELSO, NEMROW and TAYLOR
Military Appellate Judges

[Dated, Entered and Filed Clerk of Court
US Army Court of Military Review]

2 Sep 1970

CM 421998

UNITED STATES

v.

Private (E-1) PHILIP W. GOGUEN, 026-32-0676, U. S.
Army, Special Processing Detachment, Special
Troops, US Army Training Center, Infantry, Fort
Dix, New Jersey

General Court-Martial Convened by Headquarters US
Army Training Center, Infantry and Fort Dix, Fort
Dix, New Jersey (T. J. Nichols, Military Judge)

Sentence adjudged 27 August 1969 Approved sen-
tence: Bad-conduct discharge, confinement at hard
labor for six months, and forfeiture of \$100.00 per
month for six months.

Appellate Counsel for the Accused:

CPT Libero Marinelli, Jr., JAGC
CPT Bernard J. Casey, JAGC
LTC Charles W. Schiesser, JAGC

Appellate Counsel for the United States:

CPT John C. Lenahan, JAGC
CPT Benjamin G. Porter, JAGC
COL David T. Bryant, JAGC

OPINION OF THE COURT

TAYLOR, Judge:

Contrary to his pleas, the appellant was convicted, on 4 June 1969, by a general court-martial, of an unauthorized absence for a period of about 18 days (Charge II) and of disobeying the order of a superior commissioned officer to put on a proper military uniform (Charge I) in violation of Articles 86 and 90, Uniform Code of Military Justice (UCMJ), 10 USC §§ 886 and 890, respectively. He was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor for 12 months. The convening authority approved the finding of guilty but, because of an instructional error at trial, set aside the sentence and ordered a rehearing thereon. The rehearing on sentence was held on 27 August 1969, and the appellant was sentenced, by a military judge sitting alone as a general court-martial, to a bad-conduct discharge, forfeiture of \$100.00 pay per month for six months, and confinement at hard labor for six months. The same person who served as law officer [hereafter referred to as military judge] at the original trial was the military

judge at the rehearing on sentence.¹ On 17 October 1969, the convening authority approved the sentence adjudged at the rehearing.

On 14 October 1969, the United States District Court for the District of New Jersey granted a petition for writ of habeas corpus and ordered that the appellant be discharged from the custody of the Army.² In compliance therewith, he was released from custody and control of the United States Army on 27 October 1969.³

Appellate defense counsel assign the following errors:

¹ Effective 1 August 1969, the UCMJ was amended by the Military Justice Act of 1968, 82 Stat. 1335 (1968). Before the amendment the trial judge at a court-martial bore the title of law officer. Under the Act, the title was changed to military judge. The Act also provided that a court-martial could consist of only a military judge if requested by an accused. See Article 16, UCMJ, 10 USC § 816.

² *Goguen v. Clifford, et al.*, 304 F. Supp. 953 (D. N.J. 1969). The district court held that the sole test for discharge on the basis of conscientious objection is the sincerity of the objector's belief that war is wrong. Subsequently, the Supreme Court in *United States v. Welsh*, 90 S.Ct. 1792 (1970), indicated that this is not a correct statement of the law.

³ SO No. 300, Headquarters, U.S. Army Training Center, Infantry and Fort Dix, New Jersey, dated 27 October 1969, as amended by SO No. 337, that headquarters, dated 3 December 1969.

I

Erroneous Disposition By the Secretary of the Army of An Application for Discharge Under the Provisions of AR 635-20 Through Employment of Incorrect Decisional Standards Is a Defense To a Charge of Subsequently Disobeying An Order Conflicting With the Conscientious Objection Beliefs Providing Basis for the Application.

- A. The Decision of the United States District Court of New Jersey That the Appellant Is a Conscientious Objector Entitled to Discharge Under the Provisions of AR 635-20 and That the Secretary of the Army Improperly Denied the Appellant's Application for Such Discharge Through Employment of An Incorrect Decisional Standard Is *Res Judicata* and Binding Upon the Military Judicial System.
- B. The Military Judge's Refusal, Based on His Notion That the Court-Martial Was Without Jurisdiction To Review the Correctness of the Secretary of the Army's Decision on the Appellant's Application for Discharge Under the Provisions of AR 635-20, To Allow Litigation of the Propriety of That Decision Was Prejudicial Error.

II

The Evidence Presented At Trial Is Insufficient As a Matter of Law To Prove Beyond a Reasonable Doubt That the Order in Question Was Not Given Solely for the Purpose of Increasing Punishment.

III

The Military Judge in Recommending That the Secretary of the Army At a Later Date Substitute An Administrative Discharge for the Bad Conduct Discharge Which He Adjudged As Part of the Sentence Impeached the Appropriateness of the Punitive Discharge Portion of the Sentence.

Assigned Errors IA and II are without merit and do not warrant discussion.

At the original trial of this case, the defense moved to dismiss the disobedience charge on the ground that the order given to the accused was unlawful because there was no basis in fact for the finding by the Department of the Army that the accused was not a religious, conscientious objector and entitled to separation as such. The military judge denied the motion on the basis that he was not empowered "to review the administrative determination connected with" a "conscientious objector application."

The record indicates that the appellant filed a first application for discharge as a conscientious objector on 29 January 1968. The application was disapproved by the Secretary of the Army on 10 June 1968. The reason for disapproval was expressed as:

"Not based upon religious training or belief but upon personal philosophical views."

At the time of trial, the administrative record of that application was in evidence before the United States District Court in connection with the appellant's petition for writ of habeas corpus. The defense counsel expressed a desire to present it in evidence at the court-martial. The military judge ruled that the court was not empowered to rule on "any question of

fact, law, or mixed law and fact" connected with "the administrative determination." He also stated that he would rule that the file was inadmissible if it was offered in evidence as a defensive matter on the merits. He further advised that it might later be admissible as a mitigating factor during the sentencing portion of the trial. Since the file was never offered in evidence, it is not contained in the record of trial and the facts discussed in this opinion are not taken therefrom.

Although the motion to dismiss was denied and conscientious objection was not allowed as a defense, some evidence of the issue was interjected into the original trial.

In July 1968, the appellant submitted a second application which asserted that new evidence was attached. This application was marked as a defense exhibit for identification and offered in evidence both on the merits and after findings. Although admission into evidence was rejected in each instance, the file, having been marked for identification, is attached to the record.⁴ On 24 September 1968, the second application was returned to the appellant by Headquarters First United States Army, without action, in accordance with paragraph 5, AR 635-20, 17 August 1968, because the evidence in the second application was not so substantially different from that in the first as to warrant favorable consideration. Apparently, some later action was taken on this application since it was not until 14 February 1969 that the unit commander advised the appellant that his application had been finally disapproved and that he would be reassigned

⁴ At the rehearing on sentence, the military judge indicated that he would consider all matters contained in the record of the original trial.

to another unit to complete basic training. At the time of rendering this advice, the unit commander noticed that the appellant was wearing civilian clothes and issued the order for the appellant to don a uniform. The unit commander testified that before this time the appellant had always been dressed in an appropriate uniform. The appellant testified that he had not been wearing a uniform for two days prior to this encounter. Pending final action on his application, the appellant had been assigned to limited duties that did not conflict with his asserted beliefs, primarily clerical duties, but had not been excused from wearing a uniform.

Immediately after sentencing the appellant at the rehearing the military judge stated:

"As to your conscientious objector assertions, I think the record is clear from the original hearing that I did not think that this court has the right or authority to redetermine the administrative correctness of the administrative decision concerning your claim. And I certainly adhere to that. So that from the legal standpoint the claim was denied and I cannot really condone any self-help in this area. And I must say this matter has been recognized fairly recently by the Court of Military Appeals. On the other hand, as an individual, I must say that had I been in a position to assess your claim of conscientious objection, I believe that I would have granted that request and it is for this reason that, even though I believe that a bad conduct discharge is appropriate to the offenses under all the circumstances and it is for this reason I have adjudged it, at the same time I shall, and I do recommend that ultimately the Secretary of the Army substitute an administrative form of discharge.

"And finally, just to make myself clear, my expressed disagreement with the administrative determination as to your conscientious objection status is on the facts, it is not any belief on my part that there was any arbitrariness or failure to consider all the matters which I believe has been taken up by you in other proceedings in the federal district court."

In Assigned Error IB, appellate defense counsel urge this Court to hold that military judges are empowered to rule on the "correctness" and "propriety" of decisions by the Secretary of the Army to disapprove requests for discharge that are based on conscientious objection to participation in war. We cannot agree. In our opinion, the military judge was correct in his post-sentence pronouncement that he was not empowered to overrule the Secretary's determination simply because he disagreed therewith under the facts. However, *United States v. Noyd*, 18 USCMA 483, 40 CMR 195 (1969), decided after the original trial, clearly establishes that the military judge misconstrued his powers concerning his authority to act on the motion to dismiss. For the purpose of future guidance, we feel it necessary to express our views on this subject.

In *Noyd*, a case very similar to that of this appellant, the United States Court of Military Appeals held that military judges are empowered to rule on the *legality* of the Secretarial decision where the validity of a subsequent order *depends* upon that decision. In *Noyd*, the accused, like this appellant, was convicted of disobeying the order of a superior commissioned officer that was issued shortly after he was notified that his application for discharge as a conscientious objector had been disapproved. However, unlike this appellant, Noyd was convicted of disobey-

ing an order to perform a particular military task, that is, "to fly as a F-100 instructor." He had not been required to perform this duty pending final action on his application for discharge. The portion of the *Noyd* opinion which we consider critical to our discussion of this case is quoted below:

"For reasons which can be readily imagined, but need not be recited, the Department of Defense determined to help the serviceman who, while in service, developed conscientious scruples against bearing arms or participating in the military mission. The Secretary of Defense promulgated a directive to authorize separation of conscientious objectors. Department of Defense Directive, No. 1300.6, August 21, 1962, revised May 10, 1968. [Footnote omitted.] This directive was effectuated in the Air Force by the provisions of AFR 35-24, March 8, 1963. Paragraph 3 of the regulation in effect at the time of the accused's application provided as follows: 'Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standards.'

"According to appellate defense counsel, the Secretary of the Air Force erroneously assumed the regulation included the conscientious objector opposed to all war, but excluded the selective objector opposed to an 'unjust' war such as the Vietnam conflict. They further contend that this mistaken assumption led the Secretary to deny the accused's application for separation from the service. The Government maintains that, even if wrong as a matter of law, the Secretary's ruling 'had absolutely nothing to do with the order the accused chose to disobey.' The evidence is contrary to the Government's contention.

"Obviously mindful of the conflict between the needs of the service and the plight of the conscientious objector, the regulation directs that, pending consideration of an application by the Secretary, the conscientious objector be assigned duties providing 'minimum conflict with his professed beliefs.' AFR 35-24, paragraph 7. Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation had been denied. The validity of the order, therefore, depended upon the validity of the Secretary's decision in much the same way the order to the accused in the *Voorhees* case depended upon the validity of the Army's regulation on review of manuscripts by service persons which were intended for civilian publication. If the Secretary's decision was illegal, the order it generated was also illegal. See *United States v. Gentle*, 16 USCMA 437, 37 CMR 57." *Id.* at 491-492, 40 CMR at 203-204.

The Court carefully pointed out in *Noyd* that conscientious objection in and of itself is not a defense to disobedience of an order by stating:

"Fundamental to an effective armed force is the obligation of obedience to lawful orders. The obligation to obey a lawful order cannot be, and is not, as a matter of law, terminated on the mere occurrence of a condition or circumstance that might justify separation from the service. On the contrary, the obligation to obey continues until the individual is actually discharged in accordance with the provisions of law." *Id.* at 491, 40 CMR at 203.

The later opinion in *United States v. Wilson*, 19 USCMA 100, 41 CMR 100 (1969), reiterates this proposition by indicating that:

"If the command was lawful, the dictates of accused's conscience, religion, or personal philosophy could not justify or excuse disobedience."
(Emphasis added).^{*}

Our opinion does not in any way alter that rule of law.

In considering the power of the military judge to entertain a motion of the type involved in this case, we must ascertain what constitutes an "illegal" decision of a Secretary of a military department. In our opinion, *Noyd* holds that such decisions are illegal if the Secretary of the military department in reaching his decision:

- (1) *Erroneously construed the standard provided in applicable regulations.* This was the defense assertion in *Noyd*.
- (2) *Applied a standard which is inconsistent with standards provided by the Secretary of Defense or the President.* This is made clear in *Noyd* by the discussion of *United States*

^{*} This court has previously expressed concern that the holdings in *Noyd* and *Wilson* may be inconsistent. See *United States v. Avila*, — CMR — (ACMR 1970) en banc opinion). However, *Wilson* is distinguishable from *Noyd* in that the defense in *Wilson* did not contest the legality of the disapproval of the accused's application by the Secretary but merely defended on the basis of conscientious objection. *Avila* also held that conscientious objection in and of itself is not a defense to disobedience of orders. The four appellants in *Avila* had not submitted applications for discharge as conscientious objectors at the time of the alleged disobedience.

v. Voorhees, 4 USCMA 509, 16 CMR⁸³ (1954).

- (3) *Was acting on a matter which he was not authorized to decide.* See United States v. Gentle, 16 USCMA 437, 37 CMR 57 (1966), which is cited in *Noyd*.

Our study of Department of Defense Directive 1300.6, 10 May 1968, particularly paragraphs IVB3 and V thereof, satisfies us that it establishes a requirement that the military departments may not disapprove a conscientious objector application unless there is a basis in fact for so doing. Thus, if an application is disapproved without any basis in fact by a military department, it constitutes an illegal decision under (2), in the above paragraph. The directive of the Secretary of Defense (para IVB3b) also expresses a desire that claims of conscientious objection made after entry into the military service be judged by the same standards that are applied when such claims are asserted before induction. Regarding judicial review of conscientious objection decisions made before induction, Congress provided as follows in section 10(b)(3), Military Selective Service Act of 1967, 50 USC App § 460(b)(3) (1964), *as amended* (Supp V, 1970):

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the ques-

tion of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."*

Therefore, as to those applications which may be entertained,⁷ we conclude that the same judicial review should be afforded in-service conscientious objection determinations as are provided in the case of pre-induction decisions. However, we hasten to point out that the review is very strictly limited. It is restricted to reviewing only the application file that was considered by the Secretary and to determining whether that file contains any evidence to support the disapproval by the Secretary. The military judge is not empowered to conduct a trial *de novo* or to consider new evidence. See Shaw, *Selective Service Litigation and the 1967 Statute*, 48 *Military Law Review* 33, 62-70 (1970), and the authorities cited therein.

Since the trial defense counsel asserted in the motion to dismiss that it was contended that there was no basis in fact for the Secretary's disapproval of the application, we conclude that the military judge's reason for denying the motion to dismiss was incorrect. However, the denial of the motion by the military judge was proper for another reason which precludes our affording relief to the appellant.

* This provision was upheld by the Supreme Court in *Clark v. Gabriel*, 393 US 256 (1968).

⁷ Applications cannot be entertained when based solely on conscientious objection which existed but was not claimed prior to induction or enlistment or when based solely on a conscientious objection that was claimed and denied by the Selective Service System before induction. Department of Defense Directive 1300.6, 10 May 1968, paragraph IVB2.

In *United States v. Noyd, supra*, the Air Force regulation under consideration provided that a conscientious objector was to be assigned duties providing "minimum conflict with his professed beliefs" while his application was pending consideration by the Secretary. Paragraph VIB2, Department of Defense Directive 1300.6, 10 May 1968, provides that:

"Pending decision on the case and *to the extent practicable*, the person will be employed in duties which involve the minimum conflict with his asserted beliefs." (Emphasis added.)

The Army regulations in force while the appellant's applications were pending contain similar provisions. See paragraph 6, AR 635-20, 17 August 1968, and the same paragraph of the same regulation, dated 16 October 1967, 27 May 1968, 3 December 1968, and 22 January 1969. As we view the regulations, they contemplate relieving an applicant from performing military tasks, such as training or instructing, but do not encompass relief from the duty of wearing the uniform. Obviously, it is impracticable in the military environment to permit the applicant to cast off his uniform. Thus, this case is distinguishable from *Noyd* where the applicant had previously been relieved of serving as an instructor pending action on his application. There, the legality of the order to fly as an instructor was dependent on whether the Secretary's disapproval of the application was lawful because the order would not have been given except for that disapproval and the applicant was entitled to relief from instructor duties pending the disapproval. Here, the lawfulness of the order to wear a uniform did not depend on the legality of the Secretary's decision because the order was legal even if the Secretary's determination was illegal, that is, made with

no basis in fact. Accordingly, the military judge's denial of the motion to dismiss was correct.

Contrary to the position taken in the dissenting opinion, we conclude that the order in this case is clearly distinguishable from the order involved in *United States v. Bratcher*, 18 USCMA 125, 39 CMR 125 (1969). In our opinion, the order to put on a proper uniform was a specific mandate. The appellant in testifying on the merits at trial admitted on cross-examination that he understood that the order required immediate compliance. After receiving the order, he advised the unit commander that he would not comply. See *United States v. Bagby*, — CMR — (ACMR 1970), where this Court held an order "to attend training" was a specific mandate and distinguished it from orders "to train" and "to resume training."

Assigned Error III is deemed meritorious. An inconsistent sentence results when a court-martial adjudges a punitive discharge and recommends administrative discharge in lieu thereof on the basis of the same evidence which was available for consideration in adjudging the sentence. *United States v. Dille-muth*, — CMR — (ACMR 1970). Here, as in *Dille-muth*, the military judge could have recommended an administrative separation without adjudging a bad-conduct discharge. We perceive no valid reason for changing the rule when the sentence is adjudged by a military judge rather than by court members. See also *United States v. Lennon*, — CMR — (ACMR 1969). Accordingly, the bad-conduct discharge must fall.

The findings of guilty are affirmed. Reassessing the sentence on the basis of the above-indicated error and the entire record, the Court affirms only so much of the sentence as provides for confinement at hard

labor for six months and forfeiture of \$100.00 pay per month for six months.

KELSO, Senior Judge, concurs.

NEMROW, Judge, concurring and dissenting:

I concur with the determination by my brother judges that the findings of guilty of Charge II and its specification (the unauthorized absence offense) should be affirmed and that the sentence requires reassessment because of Assigned Error III.

I also concur in their conclusion that the military judge's reason for denying the motion to dismiss was incorrect. However, I disagree, in view of the special circumstances in this case, with their holding that the order to appellant—"to put on a proper military uniform"—was legal.

My review of the record leads me to conclude that all the facts and circumstances relevant to the scenario encompassing the giving of the order in question clearly indicate that it suffered from the deficiency afflicting the order in the *Bratcher* case (18 USCMA 125, 39 CMR 125 (1969)). The order in *Bratcher* was "to perform duties as a duty soldier." Reversing *Bratcher's* conviction, the Court stated the following:

"The specifications and the stipulation in the case at bar make it crystal clear that the order did not contemplate performance or nonperformance of some *special function* but rather it was an order that the accused was to perform his duties as a soldier by obeying his superiors, an obligation he was already under by reason of his status as a soldier and as a subordinate to the Captain and the First Sergeant. . . .

"... '[T]he order, whether it be oral or written, must be a *specific mandate*.' The 'order' in

this case dealt with no specific subject as such but was only an exhortation to the accused to do his duty as a soldier. No order is needed for that." (Emphasis in original)

This Court applying the principle of *Bratcher*, reversed the convictions in the following cases: *United States v. Oldaker*, — CMR — (1969); involving an order to train; *United States v. Wohletz*, — CMR — (1970), involving an order "to resume training"; *United States v. Orozco*, — CMR — (1970), involving an order "to start training."

The foregoing cases enjoin us to condemn orders which are "far too general and all-inclusive in scope," that is, an order which does not constitute a *specific* mandate, but merely exhorts one to perform an obligation that he is already under by reason of his status as a soldier. See *United States v. Oldaker*, *supra*.

Here, appellant, as a soldier on active duty, was required to obey the provisions of AR 670-5, dated 12 February 1968, which read, in pertinent part, as follows:

"The uniform will be worn when on duty by all male Army personnel. . . ."

The real basis for the order can be gathered from the tenor of Major Rekowski's testimony. I note specifically the following:

"Q. [by defense counsel]: Would you please detail for the court, Major Rekowski, the contents of your conversation with Private Goguen on the date the order was given?

"A. Well, as I previously stated, as I can recall, the first point of the discussion was the fact that his application had been denied and naturally I was interested in his recent appearance in

the federal court. I think he mentioned at that time the matter wasn't resolved in that area. I then stated, well, however, as far as the military is concerned your application has been denied and that is a final application and therefore, you are not to be treated as an applicant or potential CO and therefore, this hold status that he was in should be terminated and he should be returned to another unit. I then told him that the first step along this direction was to get into proper military uniform.

"Q. What was his reply to that?

"A. Well, he stated that his conscience would not allow him to comply with that order. I again tried to explain it in different terms. I'm sure he understood the first time, but I wanted him to have, give him every opportunity to comply, explain the dire consequences, the fact that he wore a uniform prior to this, why now should he suddenly say no. He answered that while his application was pending he could play the game, so to speak, he could comply with various rules and regulations, but now that the decision had been made he had to just live up to the dictates of his conscience and he just couldn't comply any more.

"Q. At that time, did he strike you as being sincere in his statement?

"A. His manner of presenting himself, his tone of voice, it was sincere, yes.

I do not perceive from the entire testimonial record a specific mandate to appellant, but an order so intertwined with appellant's claim for conscientious objector status that it was, as described by Major Rekowski, merely an end to a ball game:

"Q. Then, you are telling this court then that after this discussion with Private Goguen, know-

ing his past record, knowing he had just returned from an absence and knowing that he had also filed a writ of habeas corpus in a federal court and after continuously telling you he wouldn't put on a uniform, you thought by giving him an order he would change his mind?

"A. Yes, because he had run out of his alternatives. Up until this time he had applications pending and there are, therefore, he had a certain flexibility. Now, the door had been closed, the application had been denied and therefore, this flexibility did not exist and I expect as a man who puts in an application, a man expects either a yes or no answer. He must expect either and he got a no answer, he must exhibit as a man and must comply with the regulation.

"Q. Why is that?

"A. Why? Because we don't play in a game and expect to win. We hope to win, but it's possible we might lose and if we lose we must accept that as well.

"Q. In other words, because the Department of the Army says he is not a conscientious objector, does that change his status?

Accordingly, it is my view that the order concerning the wearing of the uniform was not lawful and that appellant's conviction of Charge I and its specification, as a matter of law, cannot stand.

OFFICIAL:

/s/ William O. Morris
WILLIAM O. MORRIS
Captain, JAGC
Clerk of Court

[SEAL]

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S. 6

FILED

OCT 13 1971

ROBERT SEAVEN, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-91

JOSEPH PARISI, *Petitioner*

VS.

MAJOR GENERAL PHILLIP B. DAVIDSON, et al., *Respondents*

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

GEORGE A. BLACKSTONE,
RICHARD L. GOFF,
STEPHEN V. BOMSE,
DOUGLAS M. SCHWAB,
44 Montgomery Street,
San Francisco, California 94104,
Attorneys for Petitioner.

TABLE OF CONTENTS

(CONTINUED)

| | <u>Page</u> |
|---|-------------|
| INTRODUCTION | 1 |
| ARGUMENT | 3 |
| I. SINCE EXHAUSTION OF COURT MARTIAL REMEDIES IS NOT SUPPORTED BY THE POLICIES UNDERLYING THE EXHAUSTION REQUIREMENT AND SINCE PETITIONER ASSERTS IN FEDERAL COURT A RIGHT TO DISCHARGE INDEPENDENT OF PENDING MILITARY CRIMINAL PROCEEDINGS, CIVILIAN JUDICIAL REVIEW DOES NOT CREATE UNDUE CONFLICT WITH THE MILITARY | 3 |
| II. APPROPRIATE RELIEF IS NOT AVAILABLE TO PETITIONER THROUGH THE MILITARY JUDICIARY, | 25 |
| 1. Availability of Discharge | 26 |
| 2. Adequacy of Military Judicial Remedy | 31 |

TABLE OF CONTENTS

Page

I

1. INTRODUCTION

2. SUMMARY

3. STATE EXAMINATION OF
COURT MARTIAL REPORTS
IS NOT SUPPORTED BY THE
POLICE CONCERNING THE
EXAMINATION REPORTS
AND STATE PETITIONERS
ASSETS IN FEDERAL
COURT A RIGHT TO
DISCHARGE-INDIFFERENCE
OF FINDING MILITARY
CRIMINAL PROCEEDINGS
CIVILIAN JUDICIAL
FOLLOW-UP DOES NOT
CREATE UNDER CONSTITUTION
WITH THE MILITARY

4. APPROPRIATE RELIEF
IS NOT AVAILABLE
TO PETITIONERS
THROUGH THE MILITARY
JUDICIARY

5. Availability of
Legal Aid

6. Adequacy of
Military Judicial
Remedy

31

TABLE OF CONTENTS (CONTINUED)

| | <u>Page</u> |
|---|-------------|
| III. A RECENT NINTH CIRCUIT DECISION APPEARS CONTRARY TO THE DECISION BELOW AND SUPPORTS PETITIONER'S POSITION BEFORE THIS COURT. | 36 |
| CONCLUSION | 40 |

TABLE OF AUTHORITIES

| | <u>Pages</u> |
|--|-------------------|
| <u>Cases</u> | |
| <u>Bratcher v. McNamara,</u> 9th Circuit, No. 22865, Slip Opinion, September 8, 1971 | 36, 37, 39, 40 |
| <u>Cooper v. Barker,</u> 291 F. Supp. 952 (D. Md. 1968) | 10 |
| <u>Crane v. Hedrick,</u> 284 F. Supp. 250 (N.D. Cal. 1968) | 10 |
| <u>Craycroft v. Ferrall,</u> 408 F.2d 587 (9th Cir. 1969) vacated and remanded 397 U.S. 335 (1970) | 17 |
| <u>Donigian v. Laird,</u> 308 F. Supp. 449 (D. Md. 1969) | 9 |
| <u>Gann v. Wilson,</u> 289 F. Supp. 191 (N. D. Cal. 1968) | 10, 32 |
| <u>Glazier v. Hackel,</u> 440 F.2d 592 (9th Cir. 1971) | 39 |
| <u>Goguen v. Clifford,</u> 304 F. Supp. 958 (D.N.Y. 1969) | 39 |

TABLE OF AUTHORITIES (CONTINUED)

| | <u>Pages</u> |
|--|--------------|
| <u>Cases</u> | |
| <u>Gusik v. Schilder,</u> 340 U.S. 128 (1950) | 24 |
| <u>Hammond v. Lenfest,</u> 398 G.2d 705 (2nd Cir. 1968) | 8 |
| <u>Heath v. Drew,</u> 316 F. Supp. 537 (E.D. Pa. 1970) | 22 |
| <u>Keil v. Seaman,</u> 314 F. Supp. 816 (D. Md. 1970) | 10 |
| <u>Lee v. Pearson,</u> 18 USCMA 545, 40 CMR 257 (1969) | 32 |
| <u>McGee v. United States,</u> 402 U.S. 479 (1971) | 6 |
| <u>McGehee v. McKanes,</u> 312 F. Supp. 1372 (D. Md. 1969) | 9 |
| <u>McKart v. United States,</u> 395 U.S. 185 (1969) | 5, 6, 7 |
| <u>Noyd v. Bond,</u> 395 U.S. 683 (1969) | 24, 26 |

v

TABLE OF AUTHORITIES (CONTINUED)

| | <u>Pages</u> |
|--|------------------|
| <u>Cases</u> | |
| <u>Noyd v. McNamara,</u> 378 F.2d 538 (10th Cir. 1967) | 8 |
| <u>Orloff v. Willoughby,</u> 345 U.S. 83 (1953) | 4 |
| <u>Polsky v. Wetherill,</u> 438 F.2d 132 (10th Cir. 1971) <u>cert.</u> <u>granted and cause</u> <u>remanded</u> 403 U.S. 916 (19 ___) | 8, 9 |
| <u>Talford v. Seaman,</u> 306 F. Supp. 941 (D. Md. 1969) | 10 |
| <u>United States v. Avila,</u> 41 CMR 654 | 35 |
| <u>United States ex rel</u> <u>Brooks v. Clifford,</u> 412 F.2d 1137 (4th Cir. 1969) | 7, 17, 18, 33 |
| <u>United States v. Goguen,</u> 421998 (ACMR 9/2/70) | 11, 32, 35 |
| <u>United States v. May,</u> 41 CMR 663 | 35 |
| <u>United States v. Noyd,</u> 18 USCMA 483, 40 CMR 195 (1969) | 12, 23, 30 |

TABLE OF AUTHORITIES (CONTINUED)PagesCases

United States v. Parisi,
US ACMR, No. CM 42362 31

United States v. Quirk,
39 CMR 528 35

United States v. Seeger,
380 U.S. 163 20

United States v. Stewart,
20 USCMA 272, 43 CMR
112 (1971) 28, 30, 32

Weber v. Inacker,
317 F. Supp. 651
(E.D. Pa. 1970) 22

Zemke v. Larsen,
434 F.2d 1281 (9th
Cir. 1970) 32

Regulations

Army Regulation (A.R.)
635-200 30

Statutes

All Writs Act, 28 27, 28,
U.S.C. §1651(a) 31, 33

38 U.S.C. §3103 20

TABLE OF AUTHORITIES (CONTINUED)

Pages

Miscellaneous

Note, Judicial Acceleration
of the Administrative
Process: The Right to
Relief from Protracted
Proceedings, 72 YALE
L.J. 574 (1963) 33

Davis, ADMINISTRATIVE
LAW TREATISE,
1970 Supp. 642-644 6, 33

In his prior brief, petitioner maintained that, having exhausted available administrative remedies within the military,^{1/} he is entitled to judicial review of the Army's denial of his application for conscientious objector discharge, notwithstanding pending military criminal charges against him. This follows, petitioner asserts, because courts martial are not regularly convened nor intended to review such administrative denials, and requiring exhaustion on a selective basis would

1/ The government's Brief concedes that petitioner has duly complied with the military's administrative requirements for discharge, including, even, application for review by the ABCMR -- which is seemingly requisite only in the Ninth Circuit following the Department of Justice's Memorandum of October 23, 1969 (attached as Appendix C to Respondents' Brief [Resp. Br.] at 61-62).

materially prejudice the rights of those applicants whose claims of conscience are most firmly held. More, petitioner urges that the existence of a purportedly analogous remedy within the military is tenuous, if not wholly illusory.

In its response, the government has asserted that the decision below should be affirmed in order to avoid "needless friction" with the military (Resp. Br. 7-8), and that the military criminal proceedings in fact afford petitioner a viable -- if lengthy -- route to discharge. Resp. Br. 9. With respect, petitioner submits that the former argument fails to come to grips with the competing interests in issue, and that respondents' latter point is refuted not only by the decided cases but

✓

by respondents' own claims -- here
and in other proceedings.^{2/}

ARGUMENT

I
SINCE EXHAUSTION OF COURT MARTIAL
REMEDIES IS NOT SUPPORTED BY THE
POLICIES UNDERLYING THE EXHAUSTION
REQUIREMENT AND SINCE PETITIONER
ASSERTS IN FEDERAL COURT A RIGHT
TO DISCHARGE INDEPENDENT OF PENDING
MILITARY CRIMINAL PROCEEDINGS, CIVI-
LIAN JUDICIAL REVIEW DOES NOT CREATE
UNDUE CONFLICT WITH THE MILITARY.

Relying upon the traditional
reluctance of civil courts to

2/ Petitioner is no longer in an
incarcerated status, although he is
still in the Army. We attach to this
Reply Brief, as Appendix "A", a
letter from Francis X. Plant to the
Honorable Alan Cranston, United
States Senator, describing petitioner's
present status within the military.

interfere in military affairs
(Orloff v. Willoughby, 345 U.S. 83
[1953]), respondents urge that
petitioner is required to run the
full gamut of criminal trial, appellate
and post-conviction 2a/ procedures before
being permitted access to a United
States District Court to review the
Army's administrative denial of his
discharge request. Anything less,
the Government urges, would create
an undue disruption of the military
and cause "needless friction" between
the autonomous military and civilian
judicial systems. Resp. Br. 31.
However, as we pointed out in our
earlier brief, whether exhaustion is
appropriately required in a given
case should not be made to turn

2a/ But compare Resp. Br. at 46 n.44.

simply upon the theoretical availability of a remedy,^{3/} but, rather, upon the function served by exhaustion in a given case (McKart v. United States, 395 U.S. 185 [1969]), as well as the burdens imposed upon the claimant by requiring exhaustion, measured against the asserted rights in interest. With respect, we believe that the error of respondents' brief is that it fails to proceed from a restatement of general principle -- with which petitioner has no quarrel -- to a discussion of the circumstances

^{3/} We assume for purposes of this portion of our argument that the military judiciary may, in fact, be capable of providing Parisi with suitable relief at some stage of review of his military conviction. That such remedy in fact exists, however, is by no means clear, a point we discuss at length in text, *infra* at 31-36.

where exhaustion should fairly end and the right of civil review commence.

As an initial matter, respondents concede a point which is highly significant, if not decisive, to review of the decision below, to wit, that viewed functionally requiring exhaustion in the case at bar cannot be justified on the traditional grounds of "[allowing] the administrative agency 'to make a factual record, or to exercise its discretion or apply its expertise'."

Resp. Br. 26-27. See McGee v. United States, 402 U.S. 479, 485 (1971); McKart v. United States, supra. Compare generally, Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supp. at 642-644.

While respondents' concession is commendable for its frankness, the result, we respectfully submit,

is to concede error in the decision below. Under the view urged by respondents, the sole basis for requiring further delay is the hope that the military will at some distant time act to correct prior administrative error as an incident to review of petitioner's criminal conviction. Yet such hope is hardly sufficient to outweigh petitioner's interest in obtaining judicial review of an asserted error of constitutional dimension. Cf., McKart v. United States, supra; United States ex rel Brooks v. Clifford, 412 F.2d 1137, 1141 (4th Cir. 1969).

The rule respondents would have this Court adopt is not only functionally baseless, but is random and unfairly discriminatory in operation. Respondents do not

suggest, for example, that all applicants for conscientious objector discharge are required to seek review through the military courts prior to bringing civil habeas proceedings.

Resp. Br. 24. Rather, the government has previously conceded that a serviceman seeking discharge, at least outside of the Tenth Circuit, is not compelled to commit a military offense and subject himself to military criminal proceedings before being permitted to seek civilian review.

See Department of Justice Memo.

No. 652, October 23, 1969, attached as Appendix C to Respondents' Brief

herein; Hammond v. Lenfest, 398 F.2d

705 (2nd Cir. 1968) but cf., Noyd

v. McNamara, 378 F.2d 538 (10th

Cir. 1967) and Polsky v. Wetherill,

438 F.2d 132 (10th Cir. 1971) cert.
granted and cause remanded, 403 U.S.
916 (1971).

Thus, no court martial exhaustion
is required in the many cases where
the military chooses to defer or
revoke orders to new duty assignments
pending resolution of a conscientious
objector applicant's habeas corpus
petition in the District Court.

Nor is such exhaustion necessary in
cases where, although the petitioner

4/ McGehee v. McKanes, 312 F.Supp.
1372 (D. Md. 1969). (After conscientious
objector discharge application denied
and habeas corpus petition filed,
military consents to court order
prohibiting petitioner's removal from
jurisdiction pending court deter-
mination); Donigian v. Laird,
308 F. Supp. 449 (D. Md. (1969).)
(Viet Nam orders revoked pending
outcome of habeas corpus petition.)

has committed a military offense, the military chooses not to pursue the charges, at least pending the outcome of the habeas corpus proceeding.^{5/}

Finally, the government concedes that court martial exhaustion was properly not required in cases like Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968) and Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968) where the military was actively pur-

5/ Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969) (Army advises Court that if petitioner is granted relief, it will not pursue court martial proceedings against him); Keil v. Seaman, 314 F. Supp. 816 (D. Md. 1970) (after conscientious objector application denied, petitioner goes AWOL, but military assures court that no further disciplinary proceedings are planned). See also Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968) (applicant jumped ship before filing habeas corpus application; Court's opinion is unclear, but respondents here assert that Navy had declined to prefer court martial charges, Resp. Br. 22 [n.16]).

suing court martial prosecution at the time the habeas petition was filed, but where wrongful denial of the conscientious objector application apparently would not be recognized as a defense to the particular criminal charges because of the nature of the order there in issue, e.g., refusal to put on the military uniform. See Resp. Br. 25-26 (n.20)^{6/}

In short, the only apparent circumstance in which the government urges exhaustion is where, prior to filing or consideration of the serviceman's habeas corpus petition, the military chooses to give him an order and, upon its refusal, to

6/ Cf. United States v. Goguen, 421998 (ACMR 9/2/1970)

pursue military criminal charges to which wrongful denial of his conscientious objector application might be recognized as a defense under United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). Thus, under the government's position, the availability of judicial review of and relief from military denial of a serviceman's conscientious objector claim will depend to a large extent on military commanders' discretionary decisions to issue particular types of orders and to press court martial proceedings if they are disobeyed.

What is more, the effect of the narrow rule urged by respondents is necessarily to discriminate against those persons whose claims of conscience are most strongly held. See also Crane v. Redick, 22 F. Supp. 22 (D.C. Md. 1947), where the court held that a ship before fitting out for service had declined to press court martial charges, Resp. Br. 22 (a.1.1).

As we pointed out in our opening brief (at 63), had petitioner been willing to compromise his religious beliefs during the pendency of his application before the ABCMR and, thereafter, before the District Court, he would likely have been granted discharge from the military. Compare Judge Ely's opinion below (App. 71) and see also Resp. Br. 10. However, because of the strength of petitioner's personal beliefs -- and his unwillingness to compromise them -- he has not only been subjected to harsh criminal sanctions, but has been barred from access to the federal courts.

courts. 7/

7/ The undesirable consequences of adhering to the exhaustion rule suggested by the government are sharply illustrated by the now pending case in the District Court for the Middle District of Tennessee, Joseph L. Johnson vs. Brig. Gen. Wm. Birdsong, et al, No. 6294. In that case, the petitioner's application for conscientious objector discharge, endorsed by all who personally interviewed him, was denied by the Secretary of the Army. Two days after notification of the Secretary's decision, petitioner's commanding officer ordered him to report to combat training. Petitioner refused the order and was immediately charged with violation of Article 90 of the Uniform Code of Military Justice. Petitioner filed a petition for habeas corpus (See Petition, filed September 1, 1971). The government moved to stay the habeas corpus proceeding because of the pendency of court martial, relying solely on the Ninth Circuit's decision in Parisi v. Davidson, (See respondents' Memorandum filed September 20, 1971). At the hearing, the court stayed the habeas corpus proceedings at least until conclusion of the court martial trial. We are advised that at the court martial trial petitioner's commanding officer testified that when he gave the order, he expected that petitioner would disobey

Finally, the government's apparent suggestion that exhaustion should be required wherever there is the

7/ (continued) it because of his conscientious objection. As pointed out in petitioner's opening brief, petitioner submits that the power of military officials to issue orders and initiate court martial proceedings against conscientious objector applicants should not be allowed to thwart their rights to invoke the jurisdiction of the Federal Court to test the wrongfulness of the military's denial of their discharge applications.

possibility of military action which would obviate the need for civil intervention, is inconsistent with its prior determination that proceedings before the respective boards for correction of military records need not be had as a condition of civil habeas corpus review. In a Memorandum (No. 652) of October 23, 1969, the Department of Justice announced that while application to the Army and Air Force Correction Boards would thereafter "remain an available procedure", such application would not "be insisted upon by the Government as a precondition for judicial review." See Resp. Br. 16-17 stating that exhaustion should be required so long as "appropriate

channels for review remain open within the armed services." And see also

United States ex rel Brooks v.

Clifford, supra, with Craycroft

v. Ferrall, 408 F.2d 587 (9th Cir.

1969) vacated and remanded 397 U.S.

335 (1970).

While petitioner concurs with the position taken by the Department of Justice (and the Fourth Circuit in Brooks), the present point is simply that there is an undeniably stronger basis for requiring application to the respective correction boards than for the purported "remedy" in issue here.

Unlike courts martial, review before correction boards was at least required of all discharge applicants in a given branch of the service, the

"average" time involved in seeking review was approximately four months (U.S. ex rel Brooks v. Clifford, supra, at 1141); the Boards sit as administrative, as opposed to criminal, review bodies, and there is concededly no question as to the availability of discharge relief. If, in such circumstances, the government has concluded (rightly, we believe) that requiring exhaustion before these boards is not mandated by the need to reduce "friction" between civil and military authorities, it should follow perforce, we would assume, that the decidedly more random and

attenuated remedy of court martial

"exhaustion" is also not required. ^{8/}

Notwithstanding these considerations, the government repeatedly asserts that to allow Federal Court review in these circumstances would cause a "collapse of military discipline." (Resp. Br. 17, 31, 49-50). Petitioner, it is said, has "willfully elected" to

8/ Perhaps the ultimate inconsistency in the government's argument is its concession that if petitioner is acquitted by the Court of Military Review, he would not be required to request from the Court of Military Appeals a Writ of Habeas Corpus discharging him from the Army but could then gain access to the District Court. Resp. Br. 46 (n.44). Thus, the effect of the government's argument is that petitioner must exhaust all military judicial procedures except the one procedure which the government asserts might provide petitioner the discharge relief which he seeks in the Federal District Court.

"defy" military authority and has "only himself to blame" for his predicament. (Resp. Br. 8, 10, 29, 31, 50).

But this rhetoric cannot survive careful analysis. The implicit suggestion that petitioner's action is a morally reprehensible act of defiance ignores the recognition that the true conscientious objector's disobedience to military orders is not "voluntary" but is based on the dictates of religious conscience, "an obligation superior to that due the State." (See

U.S. v. Seeger, 380 U.S. 163 at 172.

See also 38 U.S.C. §3103 quoted in petitioner's opening brief at 66).

It is also inconsistent with the Government's own concession that if petitioner's discharge application was denied without basis in fact and

he is thus entitled to discharge as a conscientious objector, the order he is charged with violating is in fact unlawful.^{9/} (See, e.g., Resp. Br.

35-36 [n.34]. But in all events, the question is not whether petitioner's action is to be condoned, but whether it should be punished by forfeiture or suspension of his right to civil relief from wrongful administrative action.

The speciousness of the government's argument is underscored by the obvious fact that District Court review will not in any way interfere with the military's right

9/ In view of respondent's censure of "petitioner's wilful disobedience of a lawful order", (Resp. Br. 29) it is also appropriate to note that the military has itself acted unlawfully if it has denied petitioner's discharge application without any factual basis.

to "discipline" the type of applicant least deserving of protection -- i.e., the serviceman whose discharge application the court finds to have been properly rejected. On the other hand, in the case of the true conscientious objector whose application has been wrongfully denied, the only "interference" caused by prompt judicial review will be the Court's determination and enforcement of his independent right to be discharged as a conscientious objector.^{10/} We respectfully submit that this does not constitute undue interference with military authority, particularly when weighed against the vital

^{10/} See, e.g., Weber v. Inacker, 317 F. Supp. 651 (E.D. Pa. 1970); Heath v. Drew, 316 F. Supp. 537 (E.D. Pa. 1970).

interests of liberty of the conscience and respect for religious beliefs which will be served by permitting prompt review in the Federal courts.^{11/}

11/ Moreover, the suggestion that requiring the conscientious objector to exhaust court martial proceedings is necessary to avoid disruption of military discipline is further weakened by the fact that in many instances the military itself has chosen to defer orders or court martial proceedings pending habeas corpus review (See cases cited at pages 9-10, supra), and also by the government's concession that exhaustion should not be required when the pending court martial proceedings would not recognize denial of conscientious objection as a defense (See Resp. Br. 25-26 (n.20)).

Likewise the argument that Parisi "has only himself to blame" overlooks the fact that the pendency of Court martial proceeding resulted not only from Parisi's refusal to obey, but from the Army's denial of his discharge application (without any basis in fact Petitioner contends) and from military commanders' decisions to insist on ordering him to Viet Nam and to press criminal charges against him.

The unsoundness of the government's position is further illustrated by the basic distinction between this case and the principle of cases such as Gusik v. Schilder, 340 U.S. 128 (1951) and Noyd v. Bond, 395 U.S. 683 (1969) on which the government relies. The court in Gusik made clear that its requirement of exhaustion was applicable to "the collateral attack of military judgments" (See Resp. Br: 14-15). Here, however, petitioner does not ask the Federal Courts for collateral attack upon, or appellate review of, the military prosecution against him. Instead, having fully pursued the administrative process, he invokes the jurisdiction of the Federal Court to recognize his independent

right to discharge as a conscientious objector if the military denial of his application was without basis and fact and hence a deprivation of his constitutional right of due process.

II

APPROPRIATE RELIEF IS NOT AVAILABLE
TO PETITIONER THROUGH THE MILITARY
JUDICIARY

Our discussion has thus far assumed arguendo that the military judiciary could, at some point, grant petitioner the relief he seeks in his pending habeas corpus action. However, the government has not only failed to substantiate that contention, but it is directly contrary to claims made in their brief before this Court and before the Court of Military Review on

appeal from Parisi's court martial conviction.

As we demonstrate hereafter, the military courts are incapable of granting petitioner discharge or, in all events, could do so only after such lengthy preliminary procedures that the theoretical availability of discharge is rendered largely meaningless. In such circumstances, this Court should well recall its caution in Noyd v. Bond, that a party is not properly "required to exhaust a remedy which may not exist." (395 U.S. at 698 [n.11]).

1. Availability of Discharge.

Apart from the adequacy of the remedy which petitioner could obtain through the military judiciary, there is a substantial question concerning the availability of a

remedy in the first instance. 12/
Respondents' brief here strenuously
asserts that at least following
final appellate review of petitioner's
criminal conviction, he may seek discharge
through habeas corpus in the Court of
Military Appeals under the so-called
All Writs Act, 28 U.S.C. §1651(a).
Compare Resp. Br. 42-45. Yet while

12/ As an initial matter, in terms of
what constitutes an appropriate
"remedy" here, the issue is not simply
petitioner's right to place his
conscientious objection in issue as a
defense at his court martial, but the
reasonable availability of discharge
from the military as a conscientious
objector, without resort to federal
district court. Such discharge is,
after all, the principle remedy
sought in the pending habeas
corpus action out of which this
proceeding arises.

the government "assumes" (Resp. Br. 45) the existence of such right, it freely concedes that the All Writs Act has never, in fact, been so utilized. ^{13/}

Moreover, notwithstanding the

^{13/} Apart from the purported availability of discharge through collateral proceedings under 28 U.S.C. §1651(a), respondents' brief suggests -- quoting Judge Darden's separate opinion in United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1971) -- that if petitioner's defense (under United States v. Noyu, *supra*) of wrongful denial of his discharge application were upheld by the military judiciary, "the Secretary would have no practical alternative except to discharge" him. (Resp. Br. 41).

In terms of the availability of appropriate remedies, however, the government does not suggest what recourse is open to a serviceman in the event the Secretary, generally or in a given case, does not act to discharge him.

Equally, the quoted portion of Judge Darden's opinion in Stewart does not -- if read in context -- support the proposition for which it is cited by respondents. The quotation appears

government's position before this
Court, its brief filed in the
Court of Military Review on appeal

13/ (continued) in the following
paragraph:

"If in a collateral way a court martial can declare an order is illegal because under the discretionary regulation a secretary has denied an application for discharge, the secretary would have no practical alternative except to discharge the member. A member of the armed forces who could with impunity refuse any orders is more than useless. Such a procedure would transfer the authority to decide who should be discharged from the military department to a court that is without legislative authority to decide such questions. This would clearly conflict with the statutory grant of authority to administer the armed forces.

Indeed, the thrust of Judge Darden's opinion is that the military cannot tolerate "a procedure [which] would transfer the authority to decide who should be discharged from a military department to a court . . ." Far from supporting

from Parisi's court martial conviction

13/ (continued) the government's position here, Judge Darden would totally repudiate the decision in United States v. Noyd, supra. Compare the separate Opinion of Chief Judge Quinn in United States v. Stewart, supra.

Nor is the government aided by the suggestion that if the serviceman were acquitted of the military charges on the ground of conscientious objection, he could be discharged under the authority of Army Regulation 635-200. (Resp. Br. 41, 44 [n.42]). As made clear by this regulation (quoted at Resp. Br. 58), its discharge procedure applies only "upon the final judicial determination of a convening authority of a general or special court martial, a law officer, a president of a special court-martial or military appellate agency, that an individual is not currently a member of the Army." (emphasis added). If a determination that a serviceman's conscientious objection discharge application has been wrongfully denied constitutes a determination that he is "not currently a member of the Army" -- or "lack of jurisdiction" as the government also calls it (Resp. Br. 44 [n.42]), then an additional reason for not requiring exhaustion would be found in the principle (also conceded by the Government) that exhaustion has never been required where persons "contest the underlying jurisdiction of the military. . . ." (Resp. Br. 16 [n.9] and 29 [n.25]).

takes a contrary view:

[Parisi] requests this Court to order that he be granted an honorable discharge. However such an action is not within this Court's jurisdiction under 28 U.S.C. §1651(a) since the action is an administrative one and not an integral part of the proceedings of a court martial. Therefore, it is not a proper subject of this Court's powers." [citations omitted] (emphasis added). 14/

2. Adequacy of Military Judicial

Remedy. Increasingly, courts confronted with "exhaustion of remedies" claims

have regarded not simply the theoretical existence of the asserted remedy,

14/ Government's Reply to Assignment of Errors, United States v. Parisi, U.S.A.C.M.R. No. CM 42362, at page 16.

Apart from the unavailability of discharge, the right to assert denial of conscientious objector discharge as a defense to military criminal charges is extremely tenuous. It has been hedged about with numerous exceptions, e.g., for particular types of orders and offenses (See Resp. Br. 35-38 and cases there cited), and its viability in any

✓14/ (continued) circumstances has been questioned (Lee v. Pearson, 18 USCMA 545, 40 CMR 257 (1969); United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1971), even by the government's brief on Parisi's military appeal which states: "Initially the government submits that, while in the military, a service member cannot within punity refuse to obey an order because he feels that the Secretary has abused his discretion in denying his application for a discharge. United States v. Stewart, 20 USCMA 272, 43 CMR 112 (1970)" (Br. 2-3).

Moreover, assuming the defense is available in limited circumstances, the military court's review of discharge denial appears considerably more restrictive than judicial review on habeas corpus. Compare United States v. Goguen, supra (court "restricted to reviewing only the application file") and Parisi's court martial trial (court refused motion for production of minutes of conscientious objector board decision denying Parisi's application) with Zemke v. Larsen, 434 F.2d 1281 (9th Cir. 1970) (court reviewed notes of board members to ascertain basis of their decision) and Gann v. Wilson, supra (court considered factual affidavits relating to whether matters in the application furnished rational basis in fact for denial).

but its practical availability -- including particularly when the remedy may be pursued and the length of time required in obtaining review. See, e.g., Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Protracted Proceedings, 72 YALE L.J. 574 (1963); Davis,

ADMINISTRATIVE LAW TREATISE

Such concerns are of the greatest significance where important personal liberties are at stake. Compare, e.g., U.S. ex rel Brooks v. Clifford, supra, 412 F.2d at 1141. Notwithstanding this concern for the "timeliness" of asserted remedies, respondents' brief flatly asserts that petitioner's right to seek discharge under the All Writs Act (if such right there be) is adequate notwithstanding the admitted

fact that such jurisdiction may be invoked only after the court martial proceedings have run their entire course at the trial and the appellate levels. See Resp. Br. 23 (n.17) and 45 (n.43 and text accompanying).

There can be no dispute that such procedures would take months, if not years, to complete. ^{15/} And,

15 / Petitioner's case in the military courts is now under submission before the Court of Military Review, the intermediate appellate court within the military judicial structure. On September 17, 1971, Captain Richard A. Cooper, of the Defense Appellate Division of the Judge Advocate General's Corps, wrote to counsel for petitioner stating that a decision could be expedited within two to four months (See Appendix B, page 44, infra). Petitioner was jailed and charges were preferred in January 1970. His court martial trial was held in April 1970. Even without his requests for enlargements of time to file his brief in the military appeal, it is apparent from an

although the government may see no

15/ (continued) examination of military cases cited by respondents that a one year delay between trial and decision by the military's intermediate appellate court is not unusual. E.g., United States v. Avila, 41 CMR 654 (eleven months); United States v. May, 41 CMR 663 (twelve months); United States v. Quirk, 39 CMR 528 (eleven months); United States v. Goguen, supra, (twelve months - See Appendix D to respondents' brief).

Following a ruling by the Court of Military Review, the decision below would require appeal to the Court of Military Appeals, and seeking relief by extraordinary writ from that court.

pertinent in such delay, we find it
frankly difficult to view such an

attenuated procedure as presenting a
viable "remedy" within the
contemplation of traditional

exhaustion principles. Indeed,

while it is an admitted cliché, given

the circumstances of petitioner here

(and of numerous others situated

similarly) the notion that

"justice delayed is justice denied"

has undeniable pertinence.

III

A RECENT NINTH CIRCUIT
DECISION APPEARS CONTRARY
TO THE DECISION BELOW
AND SUPPORTS PETITIONER'S
POSITION BEFORE THIS COURT.

Petitioner's counsel have just
received a copy of the decision
of the United States Court of
Appeals for the Ninth Circuit in
Bratcher v. MacNamara, (No. 22865,

Slip Opinion September 8, 1971/16/

In Bratcher, petitioner's habeas corpus action seeking discharge as a conscientious objector was filed in the District Court while a court martial was pending on charges that petitioner -- prior to submitting his discharge application -- had been absent without leave and had defied orders to cut weeds growing behind the post hospital buildings. The district court denied relief on the ground, inter alia, that habeas corpus was inappropriate in view of the pending court martial.

On appeal, the Ninth Circuit

16/ The Ninth Circuit's prior opinion in the case is reported as Bratcher v. MacNamera, 415 F.2d 760 remanded sub nom Bratcher v. Laird, 397 U.S. 246 (1970).

has now reversed the district court on this point.^{17/} Noting that "habeas corpus is the accepted vehicle for testing legality of retention [custody] of servicemen in the military," the court held:

"In view of the evolution in the law, we are constrained to hold that it was error for the trial court to dismiss the complaint on the ground that the pending court martial ousted the court of jurisdiction or militated against the granting of any relief."

Without explanation, the court did not cite its prior opinion in Parisi nor did it in any way suggest that exhaustion of court martial

17/ The district court's alternative determination on the merits (i.e., that there was a basis in fact for the Army's denial) was affirmed.

remedies was a precondition to
habeas corpus review of Bratcher's
claims on the merits. ^{18/}

Although respondents would
apparently distinguish Bratcher

18/ Citing Glazier v. Hackel,
440 F.2d 592 (9th Cir. 1971).
("Habeas corpus is the accepted
vehicle for judicial review of
a military department's
administrative denial of a
serviceman's application for
classification as a conscientious
objector . . ."), Bratcher
also rejected the District
Court's view that habeas corpus
is unavailable where a favorable
decision on the petition would
not result in discharge of
petitioner from custody. However,
the court did not attempt to
pass upon whether a favorable decision
would or would not have that effect
in the circumstances of the then-
pending case. Compare Goguen v.
Clifford, 304 F. Supp. 958
(D. N.Y. 1969).

because of the nature or timing of the orders there involved (compare Resp. Br. 35-36), it is difficult to see how prompt civilian review should be available to a serviceman who goes AWOL and disobeys an order to cut weeds before even filing an application for discharge, but denied to one who conscientiously refuses orders to Viet Nam after his discharge application has been fully processed and denied. In short, we submit that the Ninth Circuit's holding in Bratcher only underscores the error of the decision below in these proceedings.

CONCLUSION

For the reasons set forth above and in his prior brief, petitioner

respectfully requests this Court
to reverse the decision of the
Ninth Circuit Court of Appeals and
to remand this action for proceedings
on the merits.

Dated at San Francisco,
California, this 12th day of
October, 1971.

Respectfully submitted,

GEORGE A. BLACKSTONE
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB

APPENDIX A

UNITED STATES SENATE

Committee On

Labor and Public Welfare

Washington, D.C.

20510

August 2, 1971

Mr. Richard L. Goff
44 Montgomery Street
San Francisco, California 94104

Dear Mr. Goff:

Enclosed is the official response
to my inquiry in your behalf. I
hope that this reply will be
useful and informative.

If I can be of any further assistance,
please do not hesitate to let me know.

With best wishes,

Sincerely,

/s/ Alan Cranston

Enclosure

APPENDIX A

16 Jul 1971

Honorable Alan Cranston

United States Senate

Dear Senator Cranston:

This is in response to your communication of July 7, 1971 relative Joseph Parisi, SSN 048-34-0718.

Please be advised that Mr. Parisi's case was considered by the Army and Air Force Clemency and Parole Board on 29 June 1971. The approved action was to remit the unexecuted portion of his sentence to confinement. Release under parole supervision was not considered necessary. Mr. Parisi was released from confinement on 8 July 1971. He was placed in an excess leave status inasmuch as the appellate review of his case has not been completed.

I hope that this information will be sufficient for your needs. In accordance with your request, the inclosures forwarded with your letter are being returned herewith.

Sincerely,

signed

Francis X. Plant
Special Assistant

Incl:
a/s

APPENDIX B

JAGVT: 17 September 1971
Re: United States v. Parisi,
CM 423632

Douglas M. Schwab, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, California 94104

Dear Mr. Schwab:

Pursuant to my telephone conversation with your secretary on 16 September 1971, I am forwarding herewith copies of all pleadings filed with the Army Court of Military Review in the above-entitled case. The enclosed are photo copies of our records and not authenticated copies of the original documents which are filed with the Clerk of the Court.

As I indicated to your secretary, Mr. Jeffrey Steinborn, Parisi's civilian counsel has submitted the case on his brief. A decision of the Court can be expected in a 2-4 months.

Special Assistant

APPENDIX B

I hope this information will be of value to you.

Sincerely yours,

Richard A. Cooper
Captain, JAGC
Appellate Defense Attorney
Defense Appellate Division

Incl

1. Notice of Appearance
2. Defense enlargements (8)
3. Government enlargements (2)
4. Attorney of Record Designation
5. Assignment of Errors & Brief
6. Reply to Assignment of Errors

CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
UNITED STATES) NO. 70-91

The undersigned hereby certifies
that three copies of the foregoing Reply
Brief of Petitioner were mailed today

to the Solicitor General, Department
of Justice, Washington, D. C. 20530,
as attorneys for the respondents in this
cause.

Dated: October 12, 1971.

DOUGLAS M. SCHWAB

Mr. Jeffrey A. Schabert, a
civilian counsel has submitted the
case on his brief. A decision of the
Court can be expected in 3-4 months.

PARISI v. DAVIDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 70-91. Argued October 19-20, 1971—Decided February 23, 1972

Petitioner, a member of the armed forces, applied unsuccessfully for discharge as a conscientious objector. After he had exhausted all his administrative remedies, he filed a habeas corpus petition in Federal District Court, claiming that the Army's denial of his application was without basis in fact. Thereafter court-martial charges were brought against him, and the District Court ordered consideration of the petition deferred until final determination of the court-martial proceedings. The Court of Appeals affirmed. *Held*: The District Court should not have stayed its hand in this case. Pp. 37-45.

(a) All alternative administrative remedies have been exhausted by petitioner. Pp. 37-39.

(b) Since the military judicial system in its processing of the court-martial charge could not provide the discharge sought by petitioner with promptness and certainty, the District Court should proceed to determine the habeas corpus claim despite the pendency of the court-martial proceedings. Pp. 39-45.

435 F. 2d 299, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 46. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Richard L. Goff argued the cause for petitioner. With him on the briefs were *George A. Blackstone* and *Stephen V. Bomse*.

William Terry Bray argued the cause for respondents. On the brief were *Solicitor General Griswold*, *Assistant Attorney General Mardian*, *William Bradford Reynolds*, *Robert L. Keuch*, and *Robert A. Crandall*.

MR. JUSTICE STEWART delivered the opinion of the Court.

When a member of the armed forces has applied for a discharge as a conscientious objector and has exhausted all avenues of administrative relief, it is now settled that he may seek habeas corpus relief in a federal district court on the ground that the denial of his application had no basis in fact. The question in this case is whether the district court must stay its hand when court-martial proceedings are pending against the serviceman.

The petitioner, Joseph Parisi, was inducted into the Army as a draftee in August 1968. Nine months later he applied for discharge as a conscientious objector, claiming that earlier doubts about military service had crystallized into a firm conviction that any form of military activity conflicted irreconcilably with his religious beliefs. He was interviewed by the base chaplain, the base psychiatrist, and a special hearing officer. They all attested to the petitioner's sincerity and to the religious content of his professed beliefs. In addition, the commanding general of the petitioner's Army training center and the commander of the Army hospital recommended that the petitioner be discharged as a conscientious objector. His immediate commanding officer, an Army captain, disagreed, recommending disapproval of the application on the ground that the petitioner's beliefs were based on essentially political, sociological, or philosophical views; or on a merely personal moral code.

In November 1969, the Department of the Army denied the petitioner conscientious objector status, on the grounds that his professed beliefs had become fixed prior to entering the service and that his opposition to war was not truly based upon his religious beliefs. On November 24, 1969, the petitioner applied to the Army Board for Correction of Military Records (hereafter

sometimes ABCMR) for administrative review of that determination.

Four days later the petitioner commenced the present habeas corpus proceeding in the United States District Court for the Northern District of California, claiming that the Army's denial of his conscientious objector application was without basis in fact. He sought discharge from the Army and requested a preliminary injunction to prevent his transfer out of the jurisdiction of the District Court and to prohibit further training preparatory to being transferred to Vietnam. The District Court declined at that time to consider the merits of the habeas corpus petition, but it retained jurisdiction pending a decision by the ABCMR, and in the meantime enjoined Army authorities from requiring the petitioner to participate in activity or training beyond his current noncombatant duties.

Shortly thereafter the petitioner received orders to report to Fort Lewis, Washington, for deployment to Vietnam, where he was to perform noncombatant duties similar to those that had been assigned to him in this country. He sought a stay of this redeployment order pending appeal of the denial of habeas corpus, but his application was denied by the Court of Appeals, on the condition that the Army would produce him if the appeal should result in his favor. A similar stay application was subsequently denied by MR. JUSTICE DOUGLAS as Ninth Circuit Justice, *Parisi v. Davidson*, 396 U. S. 1233. The petitioner then reported to Fort Lewis. He refused, however, to obey a military order to board a plane for Vietnam. As a result, he was charged with violating Art. 90 of the Uniform Code of Military Justice, 10 U. S. C. § 890, and, on April 8, 1970, a court-martial convicted him of that military offense.¹

¹ At the time of oral argument of the present case, an appeal from this conviction was pending in a court of military review.

While the court-martial charges were pending, the Army Board for Correction of Military Records notified the petitioner that it had rejected his application for relief from the Army's denial of his conscientious objector application. The District Court then ordered the Army to show cause why the pending writ of habeas corpus should not issue. On the Government's motion, the District Court, on March 31, 1970, entered an order deferring consideration of the habeas corpus petition until final determination of the criminal charge then pending in the military court system. The Court of Appeals for the Ninth Circuit affirmed this order, concluding that "habeas proceedings were properly stayed pending the final conclusion of Parisi's military trial and his appeals therefrom," *Parisi v. Davidson*, 435 F. 2d 299, 302. We granted certiorari, 402 U. S. 942.

In affirming the stay of the petitioner's federal habeas corpus proceeding until completion of the military courts' action, the Court of Appeals relied on the related doctrines of exhaustion of alternative remedies and comity between the federal civilian courts and the military system of justice. We hold today that neither of these doctrines required a stay of the habeas corpus proceedings in this case.

With respect to available *administrative* remedies, there can be no doubt that the petitioner has fully met the demands of the doctrine of exhaustion—a doctrine that must be applied in each case with an "understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U. S. 185, 193. The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. *Id.*, at 194-195;

McGee v. United States, 402 U. S. 479, 485; K. Davis, *Administrative Law Treatise* § 20.01 *et seq.* (Supp. 1970).

In this case the petitioner fully complied with Army Regulation 635-20, which dictates the procedures to be followed by a serviceman seeking classification as a conscientious objector on the basis of beliefs that develop after induction.² Moreover, following a rule of the Ninth Circuit then in effect,³ he went further and appealed to the Army Board for Correction of Military Records.⁴ The procedures and corrective opportunities

² The right of a person in the armed forces to be classified as a conscientious objector after induction is bottomed on Department of Defense Directive No. 1300.6 (May 10, 1968), issued by the Secretary of Defense pursuant to his authority under 10 U. S. C. § 133. The purpose of the directive is to provide "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." Army Regulation 635-20 was issued to effectuate the broader policies announced in DOD Directive No. 1300.6.

³ Under the rule of *Craycroft v. Ferrall*, 408 F. 2d 587 (CA9 1969), the petitioner was required to appeal the Department of the Army's decision to the civilian Army Board for Correction of Military Records in order to exhaust military administrative remedies and have access to federal court. Current governmental policy rejects *Craycroft*. Compliance with Army Regulation 635-20, not perfection of an ABCMR appeal, marks the point when military administrative procedures have been exhausted. Department of Justice Memo. No. 652 (Oct. 23, 1969). In *Craycroft v. Ferrall*, 397 U. S. 335, this Court vacated the judgment of the Ninth Circuit that the petitioner there had to appeal to the Board for the Correction of Naval Records before proceeding in federal court. But our decision was announced on March 30, 1970, more than four months after the present petitioner had appealed to the ABCMR.

⁴ In 1946, Congress enacted legislation empowering the service secretaries, acting through boards of civilian officers of their respective departments, to alter military records when necessary to prevent injustice. Legislative Reorganization Act of 1946, § 207, 60 Stat. 837, as amended by 70A Stat. 116, 10 U. S. C. § 1552 (1952

of the military administrative apparatus had thus been wholly utilized at the time the District Court entered its order deferring consideration of the petitioner's habeas corpus application.

It is clear, therefore, that, if the court-martial charge had not intervened, the District Court would have been wrong in not proceeding to an expeditious consideration of the merits of the petitioner's claim. For the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces. See, e. g., *Eagles v. Samuels*, 329 U. S. 304, 312; *Oestereich v. Selective Service Board*, 393 U. S. 233, 235; *Schlanger v. Seamans*, 401 U. S. 487, 489. And, as stated at the outset, that writ is available to consider the plea of an in-service applicant for discharge as a conscientious objector who claims that exhaustion of military administrative procedures has led only to a factually baseless denial of his application. *In re Kelly*, 401 F. 2d 211 (CA5); *Hammond v. Lenfest*, 398 F. 2d 705 (CA2).⁵

But since a court-martial charge was pending against the petitioner when he sought habeas corpus in March 1970, the respondents submit that the Court of Appeals was correct in holding that the District Court must

ed., Supp. IV). Pursuant to this legislation, each service established a board for the correction of military records whose function is, on application by a serviceman, to review the military record and intervene where necessary to correct error or remove injustice. 10 U. S. C. § 1552 (a).

⁵ The Department of Justice, in consultation with the Department of Defense, has accepted the holdings of the *Kelly* and *Hammond* cases. Department of Justice Memo, No. 652 (Oct. 23, 1969). See *United States ex rel. Brooks v. Clifford*, 409 F. 2d 700, 701 (CA4). Compare *Noyd v. McNamara*, 378 F. 2d 538 (CA10), with *Polsky v. Wetherill*, 403 U. S. 916, vacating judgment in 438 F. 2d 132 (CA10).

await the final outcome of those charges in the military judicial system before it may consider the merits of the petitioner's habeas corpus claim. Although this argument, too, is framed in terms of "exhaustion," it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.⁶ Requiring the District Court to defer to the military courts in these circumstances serves the interests of comity, the respondents argue, by aiding the military judiciary in their task of maintaining order and discipline in the armed services and by eliminating "needless friction" between the federal civilian and military judicial systems. The respondents note that the military constitutes a "specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U. S. 83, 94; *Gusik v. Schilder*, 340 U. S. 128, and that in recognition of the special nature of the military community, Congress has created an autonomous military judicial system, pursuant to Art. I,

⁶ The respondents do not contend that the military courts have a special competence in determining if a conscientious objector application has been denied without basis in fact. As they acknowledge in their brief:

"Plainly, judicial review of the factual basis for the Army's denial of petitioner's conscientious objector claim does not require an interpretation of 'extremely technical provisions of the Uniform Code [of Military Justice] which have no analogs in civilian jurisprudence,'" quoting *Noyd v. Bond*, 395 U. S. 683, 696.

Thus, it is not contended that exhaustion of military court remedies—like exhaustion of military administrative remedies—is required by the principles announced in *McKart v. United States*, 395 U. S. 185, and *McGee v. United States*, 402 U. S. 479.

The concept of "exhaustion" in the context of the demands of comity between different judicial systems is closely analogous to the doctrine of abstention. For a discussion of the exhaustion and abstention doctrines in the state-federal context, see generally C. Wright, *Handbook of the Law of Federal Courts* 186-188, 196-208 (2d ed. 1970).

§ 8, of the Constitution.⁷ They further point out that civilian courts, out of respect for the separation of powers doctrine and for the needs of the military, have rightly been reluctant to interfere with military judicial proceedings.⁸

But the issue in this case does not concern a federal district court's direct intervention in a case arising in the military court system. Cf. *Gusik v. Schilder*, *supra*; *Noyd v. Bond*, 395 U. S. 683. The petitioner's application for an administrative discharge—upon which the habeas corpus petition was based—antedated and was independent of the military criminal proceedings.

The question here, therefore, is whether a federal court should postpone adjudication of an independent civil lawsuit clearly within its original jurisdiction. Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks—discharge as a conscientious objector—would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its

⁷ Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. Cin. L. Rev. 223 (1967); Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181 (1962). Military courts are legislative courts; their jurisdiction is independent of Art. III judicial power. Following World War II, Congress, in an attempt to reform and modernize the system of military law, created the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, 64 Stat. 107. In 1968, the Code was amended by the Military Justice Act, 10 U. S. C. § 819, to improve court-martial and review procedures.

⁸ See *Hammond v. Lenfest*, 398 F. 2d 705, 710 (CA2 1968):

"Judicial hesitancy when faced with matters touching on military affairs is hardly surprising in view of the doctrine of separation of powers and the responsibility for national defense which the Constitution . . . places upon the Congress and the President. Moreover, the ever-present and urgent need for discipline in the armed services would alone explain the relative freedom of the military from judicial supervision."

processing of the court-martial charge. *Griffin v. County School Board of Prince Edward County*, 377 U. S. 218, 229; *Davis v. Mann*, 377 U. S. 678, 690-691; *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 716-717. For the reasons that follow, we are not persuaded that such relief would be even potentially available, much less that it would be either prompt or certain.

Courts-martial are not convened to review and rectify administrative denials of conscientious objector claims or to release conscientious objectors from military service. They are convened to adjudicate charges of criminal violations of military law. It is true that the Court of Military Appeals has held that a soldier charged in a court-martial with refusal to obey a lawful order may, in certain limited circumstances, defend upon the ground that the order was not lawful because he had wrongfully been denied an administrative discharge as a conscientious objector. *United States v. Noyd*, 18 U. S. C. M. A. 483, 40 C. M. R. 195.^{*} The scope of the *Noyd* doctrine is narrow, *United States v. Wilson*, 19 U. S. C. M. A. 100,

^{*} Army Regulation 635-20 provides that

"individuals who have submitted formal applications [for conscientious objector status] . . . will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications."

Noyd involved an Air Force officer who, after being denied conscientious objector status, refused to obey an order to instruct student pilots to fly a fighter plane used in Vietnam. *Noyd*'s commanding officer had refrained from ordering the accused to give such instruction until the application had been processed and denied. As the Court of Military Appeals said:

"The validity of the order [to instruct students], therefore, depended upon the validity of the Secretary's decision [rejecting the conscientious objector application] . . . If the Secretary's decision was illegal, the order it generated was also illegal." *United States v. Noyd*, 18 U. S. C. M. A. 483, 492, 40 C. M. R. 195, 204.

41 C. M. R. 100, and its present vitality not wholly clear, *United States v. Stewart*, 20 U. S. C. M. A. 272, 43 C. M. R. 112. A *Noyd* defense, therefore, would be available, even arguably, in an extremely limited category of court-martial proceedings. But even though we proceed on the assumption that *Noyd* offered this petitioner a potential affirmative defense to the court-martial charge brought against him,¹⁰ the fact remains that the *Noyd* doctrine offers, at best, no more than a defense to a criminal charge. Like any other legal or factual defense, it would, if successfully asserted at trial or on appeal, entitle the defendant to only an acquittal¹¹—not to the discharge from military service that he seeks in the habeas corpus proceeding.

The respondents acknowledge, as they must, the limited function of a *Noyd* defense in the trial and appeal of the court-martial proceeding itself. But they suggest that, if the military courts should eventually acquit the petitioner on the ground of his *Noyd* defense, then the petitioner may have "an available remedy by way of habeas corpus in the Court of Military Appeals."¹² In support of this suggestion, the respondents point to the All Writs Act, 28 U. S. C. § 1651 (a), and to cases in which the Court of Military Appeals has exercised

¹⁰ The petitioner did, in fact, interpose a *Noyd* defense at his court-martial trial, and it was rejected upon the military judge's finding that "the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive [sic] discretion."

¹¹ We have been referred to no reported military court decision (including *Noyd* itself) that has yet acquitted a defendant upon the basis of a *Noyd* defense.

¹² If the military courts should ultimately acquit the petitioner on grounds other than wrongful denial of his conscientious objector application, the respondents acknowledge that he could not seek habeas corpus in the military judicial system. In this event, therefore, the petitioner could clearly not obtain the relief that he seeks in the military court system.

power under that Act to order servicemen released from military imprisonment pending appeals of their court-martial convictions. See *Noyd v. Bond*, 395 U. S., at 695; *Levy v. Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399; *United States v. Jennings*, 19 U. S. C. M. A. 88, 41 C. M. R. 88; *Johnson v. United States*, 19 U. S. C. M. A. 407, 42 C. M. R. 9.

But the All Writs Act only empowers courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . .," and the jurisdiction of the Court of Military Appeals is limited by the Uniform Code of Military Justice to considering appeals from court-martial convictions. 10 U. S. C. § 867; *United States v. Snyder*, 18 U. S. C. M. A. 480, 40 C. M. R. 192. That court has been given no "jurisdiction" to consider a serviceman's claim for discharge from the military as a conscientious objector.

Whether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself ultimately to decide. See *United States v. Bevilacqua*, 18 U. S. C. M. A. 10, 12, 39 C. M. R. 10, 12. But the short answer to the respondents' suggestion in this case is the respondents' own concession that that court has, to date, never so much as intimated that it has power to issue a writ of habeas corpus granting separation from military service to a conscientious objector. We conclude here, therefore, as in *Noyd v. Bond*, 395 U. S., at 698 n. 11, that the petitioner cannot "properly be required to exhaust a remedy which may not exist."¹² Accordingly, we reverse the judg-

¹² This result is not inconsistent with the need to maintain order and discipline in the military and to avoid needless friction between the federal civilian and military judicial systems. If the *Noyd* defense is available and if the order that the petitioner disobeyed was unlawful if his conscientious objector claim is valid, then allowing him to proceed in federal district court as soon as military

ment of the Court of Appeals and remand the case to the District Court with directions to give expeditious consideration to the merits of the petitioner's habeas corpus application.

In holding as we do today that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service. See 50 U. S. C. App. § 456(j); *United States v. Seeger*, 380 U. S. 163.¹⁴ As the Defense Department itself has recognized, "the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces." Department of Defense Directive No. 1300.6 (May 10, 1968).

administrative remedies have been exhausted does not affect military discipline. For if the conscientious objector claim is valid, the Army can have no interest in punishing him for disobedience of an unlawful order. If the conscientious objector claim is invalid, then the Army can, of course, prosecute the petitioner for his alleged disobedience of a lawful order.

Correlatively, if the charges in military court would be unaffected by the validity of the conscientious objector claim, both the petitioner's habeas corpus action and the criminal trial in military court could proceed concurrently. See n. 15, *infra*. Needless to say, the question whether wrongful denial of conscientious objector status may be raised as a defense against various types of military charges must remain with the military courts, as they exercise their special function of administering military law.

¹⁴ See generally Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 48-51 (1967); Selective Service System Monograph No. 11, *Conscientious Objection* (1950); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409 (1952); Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 Calif. L. Rev. 379 (1968).

But our decision today should not be understood as impinging upon the basic principles of comity that must prevail between civilian courts and the military judicial system. See, e. g., *Noyd v. Bond*, 395 U. S. 683; *Burns v. Wilson*, 346 U. S. 137; *Orloff v. Willoughby*, 345 U. S. 83; *Gusik v. Schilder*, 340 U. S. 128. Accordingly, a federal district court, even though upholding the merits of the conscientious objector claim of a serviceman against whom court-martial charges are pending, should give careful consideration to the appropriate demands of comity in effectuating its habeas corpus decree.¹⁵

The judgment is reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring in the result.

I agree with the Court's view that habeas corpus is an overriding remedy to test the jurisdiction of the military to try or to detain a person. The classic case is *Ex parte Milligan*, 4 Wall. 2, where habeas corpus was issued on behalf of a civilian tried and convicted in Indiana by a military tribunal. During the Civil War all civil courts in that State were open and federal authority had always been unopposed. While the President

¹⁵ In the present case the respondents acknowledge that if the administrative denial of the petitioner's conscientious objector claim had no basis in fact, then the court-martial charge against him is invalid. It follows that, if he should prevail in the habeas corpus proceeding, he is entitled to his immediate release from the military. At the other end of the spectrum is the hypothetical case of a court-martial charge that has no real connection with the conscientious objector claim—e. g., a charge of stealing a fellow soldier's watch. In such a case, a district court, even though upholding the serviceman's conscientious objector claim, might condition its order of discharge upon the completion of the court-martial proceedings and service of any lawful sentence imposed.

34

DOUGLAS, J., concurring in result

and the Congress had "suspended" the writ, *id.*, at 115, the suspension, said the Court, went no further than to relieve the military from producing in the habeas corpus court the person held or detained. "The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it." *Id.*, at 126.

Chief Justice Taney in *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487) (CC Md.), decided in 1861, held that the President alone had no authority to suspend the writ, a position that Lincoln did not honor. To date, the question has never been resolved, and its decision is not relevant to the present case. I mention the matter because of the constitutional underpinning of the writ of habeas corpus. Article I of the Constitution in describing the powers of the legislative branch states in § 9 that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Court has consistently reaffirmed the preferred place of the Great Writ in our constitutional system. *Fay v. Noia*, 372 U. S. 391, 400; *Smith v. Bennett*, 365 U. S. 708, 713.

Article III, § 1, gives Congress the power to "ordain and establish" inferior federal courts; and § 2 subjects the "appellate Jurisdiction" of this Court to "such Exceptions, and . . . such Regulations as the Congress shall make." Once Congress withdrew from this Court its appellate jurisdiction in habeas corpus cases. See *Ex parte McCardle*, 6 Wall. 318, 7 Wall. 506. An Act of Congress passed by the very First Congress provided for the issuance of the writ. But as Chief Justice Marshall said in *Ex parte Bollman*, 4 Cranch 75, 95, "for if the means be not in existence, the privilege

itself would be lost, although no law for its suspension should be enacted." It is also true that "the meaning of the term *habeas corpus*" is ascertained by resort "to the common law;" yet "the power to award the writ by any of the courts of the United States, must be given by written law." *Id.*, at 93-94.

What courts may do is dependent on statutes,¹ save as their jurisdiction is defined by the Constitution. What federal judges may do, however, is a distinct question. Authority to protect constitutional rights of individuals is inherent in the authority of a federal judge, conformably with Acts of Congress. The mandate in Art. I, § 9, that "The Privilege of the Writ . . . shall not be suspended" must mean that its issuance, in a proper case or controversy, is an implied power of any federal judge.

We have ruled that even without congressional statutes enforcing constitutional rights, the federal judges have authority to enforce the federal guarantee. *Fay v. New York*, 332 U. S. 261, 283-284, 285, 293; *Katzenbach v. Morgan*, 384 U. S. 641, 647. Those cases involved protests by individuals against state action. Certainly the military does not stand in a preferred position.

The matter is germane to the present problem. For here the military is charged with exceeding its proper bounds in seeking to punish a person for claiming his statutory and constitutional exemption from military serv-

¹ It has been assumed that this Court has no jurisdiction to issue an original writ of habeas corpus except when issuance of the writ has been first denied by a lower court. R. Stern & E. Gressman, *Supreme Court Practice* 419-420 (4th ed. 1969). But the Court has not settled the question. See *Hirota v. MacArthur*, 335 U. S. 876, 338 U. S. 197.

Some members of the Court have felt that, absent statutory authorization, the Court may not even transfer a petition for an original writ of habeas corpus to a lower court. But that view has not prevailed. See *Chappel v. Cochran*, 369 U. S. 869.

ice. The conflict between military prerogatives and civilian judicial authority is as apparent in this case as it was in *Ex parte Milligan*. A person who appropriately shows that he is exempt from military duty may not be punished for failure to submit. The question is not one of comity between military and civilian tribunals. One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds. The Court properly does just that in the opinion announced today.

While the Court of Military Appeals has the authority to issue the writ of habeas corpus, *Noyd v. Bond*, 395 U. S. 683, 695 n. 7; *Levy v. Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399, we have never held that a challenge to the military's jurisdiction to try a person must first be sought there rather than in a federal district court.² Of

² See *Billings v. Truesdell*, 321 U. S. 542. This case involved a Selective Service registrant whose conscientious objector claim was rejected by the service. Billings subsequently reported as ordered for induction, but refused to take the required oath. The oath was then read to him, and he was told that his refusal to take it made no difference; he was "in the army now." When Billings refused an order to submit to fingerprinting, military charges were brought against him. *Id.*, at 545.

While the charges were pending, Billings sought federal habeas corpus relief, challenging the military's jurisdiction to try him on the theory that he had not been lawfully inducted. The District Court discharged the writ, and the Court of Appeals affirmed, but this Court held that Billings' induction had indeed violated existing statutory law, and ordered that the writ issue. Implicit in this holding is an affirmation of the proposition that exhaustion of military remedies, including pending court-martial, is not required of one challenging the military's jurisdiction to try him in the first instance.

While *Billings* was decided before the enactment of the Uniform Code of Military Justice, cases decided under the Code have reached similar results. See, e. g., *McElroy v. Guggliardo*, 361 U. S. 281; *Reid v. Covert*, 354 U. S. 1; *Toth v. Quarles*, 350 U. S. 11.

Noyd v. Bond, 395 U. S. 683, is not to the contrary. There, the Court was faced with a serviceman who had refused to obey an order

DOUGLAS, J., concurring in result

405 U. S.

course where comity prevails, as it does between state and federal courts, federal habeas corpus will be denied where state habeas corpus or a like remedy is available but has not been utilized. *Ex parte Hawk*, 321 U. S. 114. A petitioner must, indeed, pursue his alleged state remedies until it is shown that they do not exist or have been futilely invoked.

The principle of comity was invoked by Congress when it wrote in 28 U. S. C. § 2254 that federal habeas corpus shall not be granted a person in state custody "unless it appears that the applicant has exhausted the remedies available in the courts of the State." That principle of comity is important in the operation of our federal system, for both the States and the Federal Government

because of his asserted conscientious scruples against the war in Vietnam. His court-martial conviction was pending in the Court of Military Appeals. The issue decided against him on his federal habeas application, however, was not the jurisdiction of the military to try him in the first instance, but merely his entitlement to bail pending disposition of his military appeals. The Court held that his bail motion should first be presented to the Court of Military Appeals; but we were explicit in distinguishing *Guagliardo*, *Covert*, and *Toth*:

"The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us." 395 U. S., at 696 n. 8.

Thus, *Noyd* supports the proposition that "exhaustion is not required when a prisoner challenges the personal jurisdiction of the military." *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1233 n. 169. And Parisi's challenge is precisely of that nature.

are administering programs relating to criminal justice.³ See *Fay v. Noia*, 372 U. S. 391. But "the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant," *Noyd v. Bond*, 395 U. S., at 694, to analogous questions involving military prisoners. Military proceedings are different. As we said in *O'Callahan v. Parker*, 395 U. S. 258, 265, "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."

Comity is "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U. S. 200, 204. But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned. Cf. Comment, 43 S. Cal. L. Rev. 356, 377-378. While we have stated in the past that special deference is due the military decisionmaking process, *Gusik v. Schilder*, 340 U. S. 128, this is so neither because of "comity," nor the sanctity of the executive branch, but because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with "extremely technical provisions of the Uniform Code [of Military Justice] which have no analogs in civilian jurisprudence," *Noyd v. Bond*, *supra*, at 696.

³ As Irving Brant says in the Bill of Rights 483 (1965), "the essential differences between state and federal criminal law, though immense in subject matter, have little bearing on 'fundamental fairness' or 'basic liberties.' These are involved when overlapping jurisdictions produce double jeopardy, but the fundamentals of fairness are not different in state and federal courts."

The "special expertise" argument is often employed by the defenders of the military court system. Thus, the argument was advanced—and rejected—that the civilian judges who were to staff the Court of Military Appeals could not do service, absent military experience, to the complicated, technical niceties of military law.⁴ See,

⁴ Many of today's critics of the Court of Military Appeals feel that an insensitivity to military needs is the least of the court's problems. Recent attacks have rested on the premise that, in fact, the court has become too closely identified with the viewpoint of the military establishment it is supposed to oversee. See, e. g., R. Sherrill, *Military Justice Is to Justice as Military Music Is to Music* 214-215 (1970). Critics must concede, however, that the court has at least been partially successful in infusing civilian notions of due process into the military justice system. See, e. g., E. Sherman, *Justice in the Military*, in *Conscience and Command* 21, 28 (J. Finn ed. 1971). Thus, the court has extended to servicemen the right to a speedy trial, *United States v. Schalck*, 14 U. S. C. M. A. 371, 34 C. M. R. 151; the right to confront witnesses, *United States v. Jacoby*, 11 U. S. C. M. A. 428, 29 C. M. R. 244; the right to protection against unreasonable searches and seizures, *United States v. Vierra*, 14 U. S. C. M. A. 48, 33 C. M. R. 260; the privilege against self-incrimination, *United States v. Kemp*, 13 U. S. C. M. A. 89, 32 C. M. R. 89; the right to a public trial, *United States v. Brown*, 7 U. S. C. M. A. 251, 22 C. M. R. 41; the right to compulsory service of process, *United States v. Sweeney*, 14 U. S. C. M. A. 599, 34 C. M. R. 379; and the right to *Miranda*-type warnings, *United States v. Tempia*, 16 U. S. C. M. A. 629, 37 C. M. R. 249.

Despite these advances, however, the military justice system's disregard of the constitutional rights of servicemen is pervasive. See Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S. Res. No. 260, 87th Cong., 2d Sess.; Joint Hearings on S. 745 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a Special Subcommittee of the Senate Armed Services Committee, 89th Cong., 2d Sess., pts. 1 and 2. See also Summary-Report of Hearings on Constitutional Rights of Military Personnel, by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S. Res. No. 58, 88th Cong., 1st Sess. (Comm. Print 1963).

34

DOUGLAS, J., concurring in result

e. g., 96 Cong. Rec. 1305-1306. But civilian courts must deal with equally arcane matters in such areas as patent, admiralty, tax, antitrust, and bankruptcy law, on a daily basis.

Our system of specialized military courts, though "necessary to an effective national defense establishment," *O'Callahan v. Parker*, 395 U. S., at 265, has roots in a system almost alien to the system of justice provided by the Bill of Rights, by Art. III, and by the special provision for habeas corpus contained in Art. I, § 9. Military law is primarily an instrument of discipline and a "military trial is marked by the age-old manifest destiny of retributive justice." *Id.*, at 266.⁵ For the sake of discipline and orderliness a person in the military service must normally follow the military administrative procedure and exhaust its requirements. *Gusik v. Schilder*, 340 U. S. 128. But once those administrative remedies are exhausted, he must then be permitted to resort to civilian courts⁶ to make sure that the military regime acts

⁵ At the hearings on the proposed Uniform Code of Military Justice, one witness analogized the military court-martial panel to a jury appointed by the sheriff's office. Hearings on the Uniform Code of Military Justice before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 630 (1949). Rep. Sutton of Tennessee, himself a much-decorated veteran, summarized his views on the state of military justice during World War II by his statement, during the floor debates on the proposed Code, that "Had they used the Pentagon Building for what it was designed, a veteran's hospital, America would have been lots better off today." 95 Cong. Rec. 5727.

⁶ The Federal Rules of Civil Procedure govern habeas corpus (Rule 81 (a) (2)), that remedy being civil in nature; and those Rules are comprehensive including depositions and discovery. Rules 26-37.

The Rules of Practice and Procedure of the Court of Military Appeals (see the Rules ff. 10 U. S. C. A. § 867, Supp. 1972) contain no provisions respecting habeas corpus.

While collateral remedies have been recognized by the Court of Military Appeals since 1966, *United States v. Frischholz*, 16 U. S. C. M. A. 150, 36 C. M. R. 306, and the express power to grant habeas

within the scope of statutes governing the problem and any constitutional requirements. To repeat, both statutes⁷ and the Constitution⁸ are implicated in the claims of conscientious objectors.

Petitioner claims to be a conscientious objector and therefore not subject to military orders. He was charged with refusing to obey a military order sending him to Vietnam and has been convicted of that offense. While the court-martial charges against him were pending, he exhausted all administrative remedies for relief from the Army's denial of his conscientious objector application. In theory he could pursue his remedies within the military system by appealing the conviction or seeking habeas corpus in the Court of Military Appeals. But he need go no further than to exhaust his administrative remedies for overruling the decision that he was not a conscientious objector. If there is a statutory or constitutional reason why he should not obey the order of the Army, that agency is overreaching when it punishes him for his refusal.

The Army has a separate discipline of its own and obviously it fills a special need. But matters of the mind and spirit, rooted in the First Amendment, are not in the

corpus relief was asserted in 1967, *Levy v. Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399, the military prisoner is at a substantial disadvantage compared to his civilian counterpart. See Uniform Code of Military Justice, Arts. 32, 36, 46, and 49, 10 U. S. C. §§ 832, 836, 846, and 849. See Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 Mil. L. Rev. 1 (1965). See generally M. Comisky & L. Apothaker, *Criminal Procedure in the United States District and Military Courts* (1963). And see *Manual for Courts-Martial*, ¶¶ 30f, 34, 115, 117, and 145a (1968).

⁷ 50 U. S. C. App. § 456 (j). See *United States v. Seeger*, 380 U. S. 163.

⁸ See *Gillette v. United States*, 401 U. S. 437, 463 (DOUGLAS, J., dissenting).

34

DOUGLAS, J., concurring in result

keeping of the military. Civil liberty and the military regime have an "antagonism" that is "irreconcilable." *Ex parte Milligan*, 4 Wall., at 124, 125. When the military steps over those bounds, it leaves the area of its expertise and forsakes its domain.⁹ The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.

⁹ Another factor militating against the Court's reliance on "comity" in analyzing the insulation of the military justice system from civilian review is the enormous power of the military in modern American life.

"From an initial authorized strength of well under one thousand, our army alone has grown into a behemoth numbering well over a million men even in time of nominal peace. No longer does the military lie dormant and unnoticed for years on end, coming to the attention of the typical citizen only in time of war. Today every male resident is a potential soldier, sailor, or airman; and it has been estimated that even in time of peace such service occupies at least four percent of the adult life of the average American reaching draft age. As Chief Justice Warren recently observed:

"When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." [Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188.]"

Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 Calif. L. Rev. 379, 446-447.